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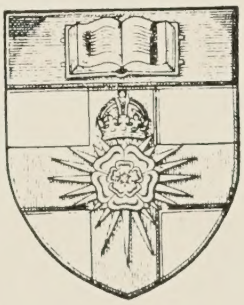

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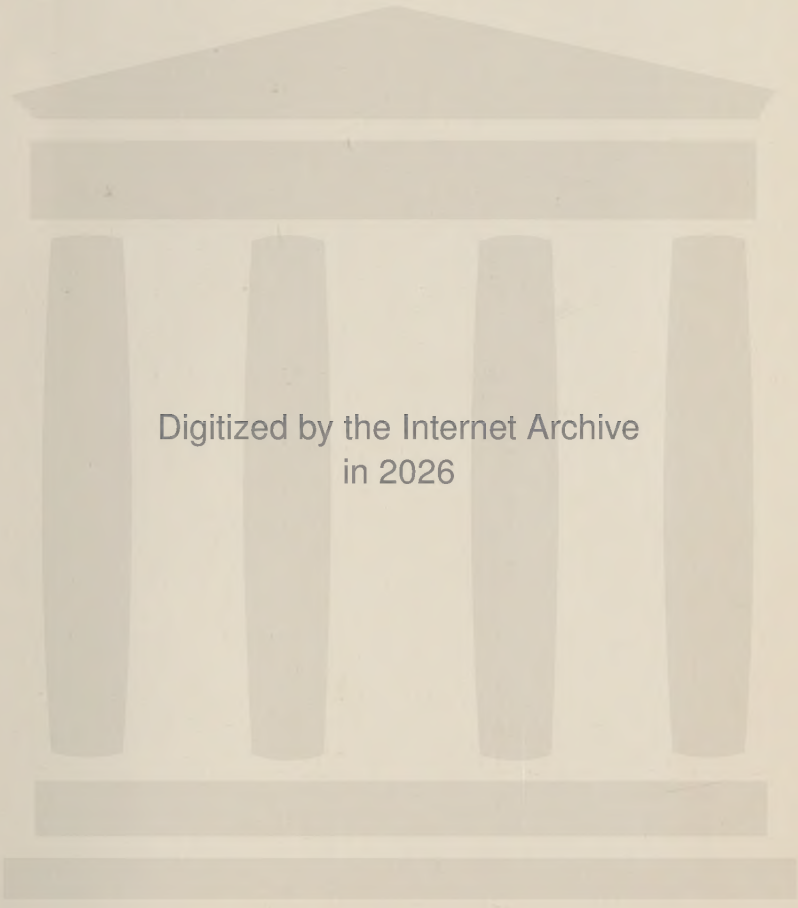

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION

1890. 1891.

BECKETT *v.* TOWER ASSETS COMPANY, LIMITED.

1890
May 9, 23;
Nov. 1.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Hiring and Purchase Agreement.*

In an action for trespass to the plaintiff's goods it appeared that the plaintiff, having applied to the defendants for a loan of 30*l.* on a bill of sale, the defendants made an inventory of his effects, but recommended him not to take a bill of sale, but to arrange with his landlord to put in a friendly distress, in which case they would buy the goods from the broker. The plaintiff assented, and, the distress having been put in, signed a memorandum requesting the broker to sell the goods to the defendants at the condemned price, and the defendants thereupon paid the broker 29*l.* 5*s.*, and obtained a receipt from him for this sum. The plaintiff afterwards, by arrangement with the defendants, brought his wife to their office, where a hiring and purchase agreement from the defendants to her was produced for her signature. On reading the document the plaintiff objected to paying what amounted to 50*l.* for an advance of 29*l.* 5*s.*; on which the defendants' representative said, "You can please yourself; we have bought the goods, and you know whether they are worth 50*l.* or not." The plaintiff "seeing," as he said, "how he was placed," told his wife to sign the agreement, which she did; and he signed another document, guaranteeing the due payment of the instalments. By the terms of the hiring and purchase agreement the hirer was to pay the defendants 1*l.* 8*s.* a month till 50*l.* was

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paid, was to pay all rent in respect of the house in which the goods were, and, in case the hirer should make default in the payment of any money payable under it, it was to be lawful for the defendants to enter the house and take possession of the goods. The plaintiff afterwards made default in the payment of the rent, and the defendants entered the house under the hiring and purchase agreement, and seized the goods in question:—

Held, by Cave, J., that the transaction was in effect a sale by the plaintiff to the defendants, subject to a right of repurchase on the terms which would have been imposed in the case of a mortgage; but that, whether it was a sale or a mortgage, neither the receipt nor the hiring and purchase agreement required registration under the Bills of Sale Acts, and that the defendants were therefore entitled to judgment.

CASE tried before Cave, J., and a special jury. The facts and arguments sufficiently appear in the judgment.

Kemp, Q.C., and *W. E. Hume Williams*, for the plaintiff.
Cock, Q.C., and *Herbert Reed*, for the defendants.

Cur. adv. vult.

Nov. 1. CAVE, J. This is an action for trespass to the plaintiff's house and for carrying away his goods.

It was tried before me and a special jury on May 9, 1890, when the following facts were proved:—

In October, 1888, John Frederick Beckett, the plaintiff, was living in Clerkenwell, in a house belonging to one Reepe. He was in debt, and owed his landlord some rent, who, however, was not pressing him for it. Seeing an advertisement of the defendants, he went to their office about October 6, and filled up a form, which was not produced, but which I infer, from the plaintiff's statement of its contents, to have been an application for a loan of 30*l.* on a bill of sale of his furniture. In the evening of the same day one Collins, from the defendants' office, went to the plaintiff's house and made an inventory of all the plaintiff's effects. At first Beckett objected to the tools and plant of his trade being included in the inventory, but afterwards assented, on the suggestion of Collins, that it would be better to put down everything he had got, as, if he got into difficulties, the Tower Assets Company would then claim the whole, and preserve it from his creditors. Collins also told him it would be a pity to have a bill of sale, and that it would be much better if he would

get his landlord to put a friendly distress in, as it would save exposure, give them a better title to the goods, and be a better security to Beckett against any future creditor. The next day Beckett went to the company's office, and assented to this course, and, in consequence of what was said to him there, he went to his landlord, and asked him to put a friendly distress in, when the company would come and buy the goods from the broker. Reepe assented to this course, and on Wednesday, October 10, signed a warrant authorizing D. A. Ball to distrain on Beckett's goods for 25*l.*, rent due on September 29, 1888, and a distress was made on that day. On the same day Beckett wrote to the company stating that the distress had been put in, and asking them to send one of their representatives the next day to settle with the landlord. The company sent down one of their representatives on Thursday, the 11th, who explained to Beckett that the broker would not be paid out then, as he must remain in possession five days to make the sale legal. On the 16th the goods were appraised by two sworn brokers at 29*l.* 5*s.* On the 17th one Godbolt, representing the company, went to Beckett's house in consequence of a letter from Beckett of the 16th inst., and, Beckett having signed a memorandum requesting the broker to sell his goods to the company at the condemned price, as he was not in a position to purchase them, Godbolt paid the broker 29*l.* 5*s.*, and got a receipt from him. Beckett then went to the company's office and saw the secretary, who told him to bring his wife down the following day at 2 P.M.

The next day, October 18, Beckett and his wife went to the company's office, when a hire agreement from the company to Mrs. Beckett was produced for Mrs. Beckett's signature. On reading the document, Beckett objected to paying what amounted to 50*l.* for an advance of 29*l.* 5*s.*; on which the company's representative said, "You can please yourself; we have bought the goods, and you know whether they are worth 50*l.* or not." "Whereupon," said Beckett, "I saw how I was placed, and told my wife to sign the agreement, which she did"; and Beckett signed another document, guaranteeing the due payment to the company of the sums to be paid under the hiring agreement. By the second clause of the hiring agreement the hirer was to pay

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the company 1*l.* 8*s.* a month until the whole of the 50*l.* was paid. By the eighth clause the hirer was from time to time to pay all rent due or payable in respect of the house in which the goods were. By the tenth clause, in case the hirer should make default in payment of any money payable under any of the provisions of the agreement, or should break or fail to perform or observe any of the stipulations or provisions thereof, it was to be lawful for the company to enter any dwelling-house to or in which any of the said goods might have been delivered or removed, or might reasonably be supposed to be found, and for that purpose to break open any doors, &c., and to take and remain in possession of any of the said goods upon such dwelling-house, or to remove the goods to such place as they should consider suitable, and to sell the same either in the dwelling-house of the hirer or at any other place. The monthly instalments were duly paid, and on June 24, 1889, no instalment was due and unpaid. With the rent, however, it was otherwise. When Christmas came round Beckett was unable to pay his quarter's rent; but the company consented not to exercise the power to remove and sell the goods on the landlord's giving them, as he did on December 27, an undertaking in writing not to distrain for that quarter's rent before February 1, 1889. Beckett, however, remained unable to pay his rent, and on January 31, 1889, the day before the expiration of the previous undertaking, Reepe gave to the company another undertaking not to distrain before February 18, and on February 16 the landlord renewed his undertaking until March 19. Beckett, however, was still unable to pay the Christmas rent, and on March 18 came to an arrangement with his landlord, by which he undertook to pay the Christmas rent on March 31, and the quarter which would become due on Lady Day by monthly instalments of 2*l.*, payable on the first Saturday in each month, and the rent subsequently to Lady Day weekly instead of quarterly, at the rate of 1*l.* each week for twelve weeks, and 10*s.* for the thirteenth week. The landlord, on the other hand, in consideration of these terms, agreed not to distrain till after March 31, provided the Christmas rent was paid on that day. The Christmas rent appears to have been duly paid on March 31. After this date Beckett paid no more rent, and on June 20 he

owed his landlord 6*l.* for overdue instalments of the Lady Day rent, and 12*l.* for weekly rent subsequent to Lady Day; and consequently, in respect of these three monthly instalments of 2*l.* each, and in respect of the twelve weekly payments of 1*l.*, there had been breaches of the eighth clause entitling the company to remove and sell the goods under the tenth clause. On June 20 the landlord agreed to forego the whole of the rent from Christmas to Midsummer, provided Beckett would give up possession of the premises on June 24, and on that day he sent to the company an undertaking not to distrain for any rent due down to June 24 if Beckett gave up possession of the premises on or before that date. On June 22 Beckett wrote to the company that he was going to remain in the house with the goods for a week longer, but was to hand over the keys and turn over the lodgers to Mr. Reepe on Monday the 24th. On getting this notice the company sent an agent to see Reepe, and get an extension of his undertaking of the 20th. Reepe, however, refused to give any further extension, and consequently, on the evening of the 24th, the company sent their men and removed all the goods included in the hiring agreement.

At the close of the evidence I asked the learned counsel on either side what questions of fact they wished me to leave to the jury. They were either unable or unwilling to say what questions of fact, having regard to the recent decisions on the subject, I ought to ask the jury; and it was therefore arranged that I should take the findings of the jury as to damages contingently, and that, except as to such findings, which I was to adopt in case they turned out to be applicable, the case was to stand over for further consideration and decision by me after the judgment of the Court of Appeal should have been given in the case of *In re Watson* (1), which was to be argued before the full Court on May 13. The jury found—1st, that the value of the plaintiff's tools was 30*l.*; 2nd, that the value of his furniture was 33*l.*; 3rd, that the plaintiff sustained damage to the amount of 77*l.*, in addition to the loss of the tools themselves by their seizure; and, 4th, that the plaintiff sustained damage to the amount of 125*l.*, in addition to the loss of the tools and furniture by the seizure of both.

(1) 25 Q. B. D. 27.

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The case of *In re Watson* (1) was argued before the Court of Appeal on May 13, but went off on another point, and the question as to what is the true test for determining whether a document is a bill of sale or not is still left open. The case came before me for further consideration on May 23, when it was contended on behalf of the plaintiff, 1st, that the receipt given by the broker to Godbolt on October 17, together with the inventory of that date, constituted a bill of sale; 2nd, that the real intention of the parties was to create a mortgage, and that putting in a distress was a collusive process done with intent to evade the Bills of Sale Acts; and, 3rd, that on the true construction of clause 8 of the hiring agreement there was no default, as the midsummer rent was not due and payable till the end of June 24. For the defendants it was submitted that the receipt and inventory did not amount to a bill of sale; 2nd, that the real intention of the parties was to effect a sale with an agreement for repurchase on the hire purchase system, and, consequently, that the hiring agreement was not a bill of sale; and, 3rd, that there had been default in not paying the monthly instalment of the Lady Day rent, and in not paying the rent of 1*l.* per week payable after Lady Day.

The first point is soon disposed of, and indeed was not argued when I took the case on further consideration. The inventory was not an inventory with receipt attached, and the receipt, although not called for or produced, was, as I gather from the evidence, not a receipt for the purchase of goods, but simply a receipt for the sum of 29*l.* 5*s.* The third point is also disposed of by the fact that Beckett was in arrear on June 24 with three monthly instalments of 2*l.* each, of the rent which became due at Lady Day, and which instalments were respectively payable on the first Saturday in April, May, and June, and that he was also in arrear with the rent of 1*l.* a week which became due and payable at the end of each of the twelve weeks beginning from March 25.

The second point is one which occurs so frequently, and it is of so much importance, that it demands particular attention. The case of *In re Watson* (1) has decided that, where a hiring

(1) 25 Q. B. D. 27.

agreement is a real letting out to hire by the owner of goods, it is not within the Bills of Sale Act, but that where, at the time when the hiring agreement is signed, the supposed letter out to hire is not, and the borrower is, the owner of the goods, the hiring agreement is a licence to take the goods of the borrower as a security for money lent, and is within the Act. As Lindley, L.J., puts it, The real truth is this—one must find out what the real transaction is. What, then, is the test which we are to employ in order to discover what is the real transaction? Unfortunately the judgments of the Court of Appeal in *In re Watson* (1) are not equally clear upon this point, and while it seems to be admitted that in some of the previous cases the Courts may have applied the wrong test and drawn the wrong inference, we are not told which those cases are. Lindley, L.J., says that in the *Yorkshire Railway Wagon Co.* v. *Maclure* (2), and in the *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3), and in the *United Forty Pound Loan Club* v. *Bexton* (4), the Court came to the conclusion—rightly or wrongly—it does not matter which—that at the time of the hiring agreement the person who let out the goods was the owner of the goods by reason of a prior transaction. "Once get at that," he adds, "and the hiring agreement is out of the Bills of Sale Act." "The moment the facts are ascertained," he continues, "the case is easy of decision and perfectly consistent with every case that is to be found in the books that I know of." In this statement I most respectfully concur. This case would be very easy of decision if I knew in which way I ought to find the facts. It was not necessary to the judgment in *In re Watson* (1) to decide whether the Courts, in the cases Lindley, L.J., mentions, had drawn the correct conclusion or not; but to me as a judge having to decide on the facts, it would be of inestimable advantage to know whether the Courts in those cases came to a right decision on the facts. I must, I think, go carefully through these and all the other previous decisions on the same subject which have been brought to my attention, and endeavour to extract from

(1) 25 Q. B. D. 27.
(2) 19 Ch. D. 478; 21 Ch. D. 309.
(3) 32 Ch. D. 477; 35 Ch. D. 191 (C.A.); 13 App. Cas. 554.
(4) Not reported.

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them the true principle on which I ought to decide what the real transaction in this case was.

The first case of any importance is *Cochrane* v. *Matthews* (1), of which we have only the judgment of Lindley, L.J. His lordship there says: "What was intended? I shall not put it in his (Mr. Cochrane's) language, but to my mind it is quite plain from his evidence that it was not intended that he should buy this property with the view of keeping it, but that he should buy it and keep it locked up in his own name in order and with the view to render it a security to him for the money which he was advancing. That is to say, the form in which he proposed to do that was not to take an ordinary mortgage, but the particular machinery by which he desired to effect his intention was that he should acquire the property and re-demise it. That was the machinery. And I take it he is quite right in saying it was intended that the property should pass when the receipt was taken; but it passed to him on an agreement that he should re-demise it. In other words, before the money was paid the whole transaction was arranged that the property should be sold to him and that he should pay 50*l.* To my mind it is plain that Cochrane could not have stopped there and have claimed the property without being guilty of a gross breach of faith. It would have been a gross breach of faith to the borrower. He could not have carted away the property at the next moment. In this sense it was his property that he might re-demise it; in other words, it was his as a security for the money." In that case there were two pieces of paper—one an inventory of goods, followed by a receipt purporting to be a receipt for the sum of 50*l.*, "for the absolute sale of the above-mentioned articles of furniture and other effects"; and the other a re-demise; and Lindley, L.J., held that the two documents constituted one transaction and one assurance which fell within the Bills of Sale Act, 1854. The only report of this case is a report of the judgment to be found in a note to *Ex parte Odell* (2), and there is no statement of the facts of the case other than such as can be gathered from the judgment. Some of the observations are not easy to understand; but I think it must be taken that Lindley, L.J., held the facts to

(1) 10 Ch. D. 80, n. (1) (March 22, 1878). (2) 10 Ch. D. 80.

be as explained by Bowen, L.J., in the *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), that there was no transaction outside the documents which affected the right of the parties or amounted to an assurance. Taking this to be so, it followed that the transaction, whatever it may have been, was recorded in two documents which were not registered, and, consequently, were void against an execution creditor under the Bills of Sale Act then in force.

The next case, *Ex parte Odell, In re Walden* (2), is not precisely in point, because there the Court of Appeal had before it two documents only, one an inventory followed by a receipt, and the other an agreement of hiring; and there was no evidence of any agreement outside those documents, and, consequently without those documents there was no contract binding the parties; but those documents alone constituted the transaction.

The case, however, is important from the dicta contained in it. James, L.J., there says (3): "What we have got here is the evidence of two contemporaneous documents, both executed as part and parcel of the same transaction—as much contemporaneous as it is possible for two documents to be—and those two documents together contain the real transaction between the parties. The real transaction which took place, as evidenced by the two documents now before us, was a bill of sale of goods for the purpose of securing a debt, the goods being in truth and in substance redeemable upon the payment of the debt with the interest thereby stipulated. The form adopted, a sale and a demise, seems to me to be wholly immaterial. The goods before the execution of the two documents were the goods of Walden. After the execution of the two documents they remained still in equity the goods of Walden, subject to a charge upon them for the money which was advanced by Cochrane by way of loan, and, it being advanced by way of loan, the goods were redeemable on the payment of the loan with interest. The two documents are the true record of the transaction, and they shew by themselves without any other evidence that the goods were originally Walden's goods; that they became, either at law or in equity, by

(1) 35 Ch. D. 191, at p. 211. (2) 10 Ch. D. 76 (Nov. 21, 1878).
(3) 10 Ch. D. 85.

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means of these two documents, Cochrane's goods as mortgagee, but liable to be redeemed by Walden. The two documents, therefore, constitute in fact a bill of sale with a defeasance upon redemption." Baggallay, L.J., gives judgment to the same effect (1), relying on the terms of the re-demise by which, in the case of a sale by the letter, the hirer was to pay the difference between the amount realised by the sale and the amount for which the property had been resold to the hirer in case the latter sum was the larger, and was to receive the surplus if the other sum turned out to be the larger. Thesiger, L.J. (2), says: "The receipt is not the only document. We have as a contemporaneous document, clearly forming part of the same transaction, the other document called the letting agreement, and I cannot conceive there being any reasonable doubt, when the two documents are read together, that the transaction was, as evidenced by the documents themselves, a sale subject to a condition or defeasance, under which upon payment of money, which is called rent, within a certain time, the person originally granting or assigning the goods would be entitled to redeem them. In other words, it was a conditional sale or mortgage of the chattels which were the subject of the sale. Upon that point we have an authority in a case exactly similar; the decision founded upon precisely similar documents to those which we have now before us—the decision, I mean, of Lindley, J., in *Cochrane* v. *Matthews* (3); and without going further into the matter I will only refer to the observations made by Lindley, J., in that case and adopt them as part of my judgment."

The *Yorkshire Railway Wagon Co.* v. *Maclure* (4) is a case of considerable importance. A railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling-stock to a wagon company for 30,000*l.*, at the same time making a contract with the wagon company for the hire of this rolling-stock at a rent which would repay the 30,000*l.* and interest in five years, three of the directors of the railway company guaranteeing to the wagon company the payment of the rent. Ultimately the wagon company brought an

(1) At p. 86.
(2) At p. 88.
(3) 10 Ch. D. 80, n.
(4) 19 Ch. D. 478 (Dec. 20, 1881).

action against the sureties and the railway company for the rent which had fallen into arrear. The defence set up was that the sale of the engines and wagons was nominal, and made in order to disguise the fact that the transaction was a loan. In his judgment, Kay, J., says (1): "I have gone through the correspondence minutely for the purpose of answering the question which I propose to ask myself—whether this was really a transaction of purchase and hire; and, if not, what was the meaning of the transaction, and I come to the conclusion that from the first, and throughout, it was on both sides treated as an advance of 30,000*l.* on the security of the rolling-stock." Again he says, "I unhesitatingly say that, in my opinion, it was a loan and borrowing of 30,000*l.*, and that the mode in which it was carried out was merely an attempt to give a security for that loan upon the rolling-stock, and that this was perfectly well known to both the contracting parties."

The case was taken to the Court of Appeal (2), where it was held that the transaction was not a borrowing of money, but a bonâ fide sale and hiring of the rolling-stock. Jessel, M.R., there says (3): "I must say, speaking for myself, and with the greatest possible respect to the learned judge of the Court below, that I never saw a stronger or clearer case, so far as the railway company is concerned, that they intended the transaction to be exactly what it is in the deed." "It appears to me that it [i.e. the contract for the hire of the rolling-stock] was the real contract between the parties, and that the original intention had been modified, that is to say, they, the railway company, intended throughout to carry out one object, namely, obtaining 30,000*l.* by repaying it in five years. That was their object, and that they carried out; on the other hand, the object of the wagon company was undoubtedly to get back that 30,000*l.* with interest by instalments over a period of five years. The mode of carrying it out was indifferent to them so long as they were safe. Therefore, they acceded to the terms suggested to them originally by the railway company to make it a sale and lease." Lindley, L.J., says (4): "I understand the view the learned

(1) At p. 483.
(2) 21 Ch. D. 309 (May 9, 1882).
(3) At p. 311.
(4) At p. 314.

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judge (Kay, J.) took was this, that this transaction of hire was a mere device or cloak to conceal a loan. If that had been the view I took of the facts, I should have come, of course, to the same conclusion; I should disregard or throw aside the cloak, and look at the real transaction alone. But for reasons I will give presently I am satisfied that the purchase and hire transaction was the real transaction in this sense—that the parties meant it to operate according to its tenor as comprised in the deeds. It was not intended by them as a mere blind or cloak for something behind; it was a transaction substituted for another, but bonâ fide substituted and intended to be acted upon according to its purport and apparent effect. The short history of the case appears to be this: that the railway company was sorely in want of money, having exhausted their borrowing powers, or very nearly so, and they wanted 30,000*l.* which they did not know how to get, and they appealed to the wagon company to know whether they could assist them. They applied as business men who were not lawyers naturally would for a loan of money on such security as they could give. There is no doubt the transaction commenced in that form—an application by the railway company for a loan. Now the persons to whom they applied for the loan were the wagon company. The wagon company had no power to lend the money, but they had the power to buy rolling-stock and to let it out on lease; and they entertained the proposal, not in any definite shape, but loosely at first, and ultimately they entertained it in the way in which they could give effect to it. I understand that the railway company found out before the transaction had assumed its ultimate shape that they were in a difficulty, that they could not borrow the money; their borrowing powers were exhausted, and they could not do it. But another method—I will not say of doing the same thing, but of doing something which was as useful as the other—was suggested, and they took advice as to its legality. Thereupon, it appears to me, the original idea was bonâ fide dropped, and another method was had recourse to, not for effecting the loan, but for effecting a different transaction, which would answer the purpose of the railway company just as well. All they wanted to do was to get the 30,000*l.* That was the real transaction between the parties, and that transaction was

one which was embodied in the deeds upon which this action is brought. If we look on that transaction as the real transaction, upon what ground can we treat it as illegal? If it were a mere cloak or screen for another transaction, one could see through it; but once come to the conclusion that it was the bonâ fide real transaction between the parties intended by both sides to operate according to its tenor, there is no mode that I know of, of holding it illegal, unless you find it prohibited by some Act of Parliament or void by reason of some principle of law. It is said to be an evasion of the Act of Parliament really to borrow the money. There is always an ambiguity about the expression, 'evading an Act of Parliament.' In one sense you cannot evade an Act of Parliament; that is to say, the Court is bound so to construe every Act of Parliament as to take care that that which is really prohibited may be held void. On the other hand, you may avoid doing that which is prohibited by the Act of Parliament, and you may do something else equally advantageous to you which is not prohibited by the Act of Parliament. It appears to me that the transaction falls under the last of these two classes: it is a transaction as useful for the railway company as the other; but it is a real transaction, and is not struck at by the Act of Parliament at all." The judgment of Holker, L.J. (1), is substantially the same.

The next case is the *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) In that case the Blacker Company, a colliery company, being in want of money, applied for assistance to the plaintiffs who were a wagon company. The Blacker Company had some wagons which they had hired on the hire purchase system; but they were in arrear in the payments they had to make. The owners of the wagons were, however, willing to waive their strict rights on receiving what remained due on the agreement, and it was arranged that the plaintiffs should purchase the wagons for a sum of 1000*l.*, part to be paid to the owners in satisfaction of their demand, and the residue to go to the Blacker Company. In pursuance of this arrangement the plaintiffs gave the Blacker Company cheques for 1000*l.*, and the Blacker Company sent the plaintiffs an invoice for 100 wagons.

(1) At p. 317. (2) 32 Ch. D. 477 (March 8, 1886).

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At the same time, an agreement was signed by the representatives of the two companies that the plaintiffs should let the 100 wagons to the Blacker Company for three years at a rent payable quarterly, the total rent for the three years amounting to 1000*l.* with interest at 7 per cent. The agreement contained a clause empowering the plaintiffs to seize the wagons and put an end to the agreement in case the rent should be in arrear for seven days, and an option for the Blacker Company to purchase the wagons at a nominal price at the end of the term. The next day the Blacker Company sent the plaintiffs receipts for the 1000*l.* The rent being in arrear, the plaintiffs seized most of the wagons; but nine of them were detained by the defendants, who were a railway company on whose line they were standing, on the ground that they had a lien on them for tolls. After referring to the Bills of Sale Act 1878 Amendment Act 1882, and to the cases of *Ex parte Odell* (1) and *Cochrane* v. *Matthews* (2), Bacon, V.C., says: "Here I find by the evidence of the plaintiffs themselves that the transaction was in its very beginning a contract for a loan to be secured—a loan providing for the repayment of the money in the manner then stipulated for and afterwards more distinctly expressed, and so the agreement, the lease of these wagons, was carried into effect. If there had been only that agreement, and if there had been nothing before the Court but that agreement, then it perhaps would have fallen within the principle that regulates contracts which have become very common nowadays, namely, contracts for the sale and hire of furniture in a house where the stipulation is that you shall pay a certain sum by instalments, and if you pay all the instalments then the goods which are at present let to you shall be yours out and out. That is not this case at all or anything like it." (3) The case was taken to the Court of Appeal (4), where the decision of the Court below was reversed on the ground that inasmuch as there was a separate and distinct oral agreement for the purchase of the wagons by the plaintiff company, the invoice and receipt sent by the Blacker Company to the plaintiff company, not being an assurance of the chattels either at law or in equity, did

(1) 10 Ch. D. 76.
(2) 10 Ch. D. 80, n.
(3) At pp. 495, 496.
(4) 35 Ch. D. 191 (Dec. 15, 1886).

not constitute a bill of sale within the Acts. In that case Fry, L.J., says (1): "Now, upon the first question, which is one of fact, whether this transaction was in substance a loan, I feel myself unable to agree with the learned Vice-Chancellor. It appears to me, having attended to the arguments for the respondents, that the true transaction was that which found expression in the instruments themselves, and that the very incapacity of the plaintiff company to make a loan, coupled with its capacity to enter into a transaction for the purchase of wagons and the leasing of wagons, was a very strong reason why the contracting parties never intended to come to a contract for loan, whereas they intended to come, and in this case did in fact come, to a contract for sale and hire. Again, when the circumstances are carefully examined, it appears impossible to find any evidence of the consent of the contracting parties to come to any other bargain than that which was truly expressed by the instruments: and, therefore, this does not appear to me to be a case in which one bargain was really entered into and another expressed on the face of the instruments, but a case in which the contracting parties never did contemplate a loan, but did throughout contemplate a sale and hiring, throughout contemplated that very transaction which is expressed in the instruments, and no other. I think, therefore, the transaction was not one for a loan, but, as I have said, for sale and hiring."

This decision was affirmed by the House of Lords. (2) Lord Macnaghten there says (3): "In the next place, the transaction between the Blacker Company and the respondents was in no sense a security for the payment of money. It would not have been a security for the payment of money if the title derived from the Sheffield Company had been out of the way. There was no loan, no debt, no mortgage. When the respondents took possession of the wagons in the exercise of the right reserved to them the agreement was at an end. The Blacker Company could not have redeemed the wagons. If the wagons had fetched twice the amount of the instalments then remaining unpaid, the Blacker Company would have been none the better, and they

(1) At p. 214.

(2) 13 App. Cas. 554 (July 30, 1888).

(3) At p. 567.

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would still have continued liable for the arrears. If the wagons had not been worth sixpence, the respondents could not have claimed from the Blacker Company anything beyond the arrears of rent then actually due." And again he says (1): "As regards their legal incidents, there is all the difference in the world between a mortgage and a sale with a right of repurchase. But if the transaction is completed by redemption or repurchase, as the case may require, there is no difference in the actual result." And again (2): "In all these cases the question is, What was the real intention of the parties? As Lord Cranworth observed in a case where the documents were of a more formal character, 'The rule of law on this subject is one dictated by common sense, that primâ facie an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an actual conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase': *Alderson* v. *White*." (3) Lord Watson expressed his concurrence in Lord Macnaghten's judgment.

In the meantime the case of *Gapp* v. *Bond* (4) had been decided by Mathew, J., whose decision was affirmed by the Court of Appeal. When I had to decide the case of *In re Yarrow* (5), I found myself much embarrassed by this case, which appeared to me to have been decided on principles inconsistent with the cases I have already cited. Probably I was wrong in coming to that conclusion; but it is of no importance now whether I was wrong or right, as it appears from the observations of the Lords Justices in *In re Watson* (6), that it was not intended in that case to lay down any principle at all inconsistent with the decisions in the cases I have cited. The facts of the case have never been reported, and my knowledge of them was derived solely from a shorthand note of the judgments.

Then comes *Redhead* v. *Westwood*. (7) In that case the facts were, that in June, 1886, Walter Redhead applied to Westwood

(1) At p. 567.
(2) At p. 568.
(3) 2 D. & J. 105.
(4) 19 Q. B. D. 200 (May 12, 1887).
(5) 59 L. J. (Q.B.) 18.
(6) 25 Q. B. D. 27.
(7) 59 L. T. (N.S.) 293 (July 11, 1888).

to lend him 100*l.*, which Westwood objected to do. It was then suggested that Westwood should buy the furniture in Redhead's house, and re-demise it to Redhead, which Westwood agreed to do; and eventually an agreement in writing was entered into on June 11, 1886, by which it was agreed that Westwood should let the furniture to Redhead until July 10 then next, Redhead to pay Westwood 100*l.* for the use of the furniture, 50*l.* on June 25, and 50*l.* on July 10, and that on breach by Redhead of any of the stipulations it should be lawful for Westwood to take possession of the furniture or remove and sell it. On the signing of the agreement, Westwood gave Redhead a cheque for 100*l.* payable to his order, but no receipt was given. Redhead failed to pay either of the instalments, and died on July 5, 1886. On July 15, Westwood took possession of the furniture, and removed a part of it, whereupon an action was brought against him by Redhead's widow and administratrix, for a declaration that the agreement was void as being an unregistered bill of sale. In giving judgment, Kay, J., says: "Now, what is the transaction here? There is an agreement, which no doubt was intended to evade the requirements of the Bills of Sale Acts. Redhead agreed to sell to Westwood certain furniture. Then a cheque for 100*l.* was given by Westwood, drawn to the order of Redhead, who signed his name on the back of it; but no receipt was given. The sale and purchase were carried out simply by the payment of the money, and no document whatever relating to a sale or purchase was given. So that there was no bill of sale whatever relating to a sale or purchase. If there had been any document amounting to a bill of sale the Bills of Sale Acts would have set it aside. I think that the parties are to be congratulated on their ingenuity. The parties intended the transaction to be one of the loan of money, and a security for that loan was given in a form so as completely to evade the Bills of Sale Act. In the case of the *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), there was no document which amounted to an assurance on sale and purchase; but there was, as here, a hiring agreement, which the learned judges said could not by itself be treated as a bill of sale, there

(1) 32 Ch. D. 47; 35 Ch. D. 191; 13 App. Cas. 544.

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being no other document connected with it, as in *Cochrane* v. *Matthews* (1), and *Ex parte Odell.* (2) Accordingly, the Court held that there was no bill of sale, and that the transaction of sale and purchase was complete without any assurance of any kind. Here the transaction was complete without any assurance; there was no document so connected with it as to make it a bill of sale. Therefore I am bound by the *North Central Wagon Co.'s Case* (3) to hold that the parties here have succeeded in evading the Bills of Sale Acts, and that the agreement in question was a valid agreement for hire." There is some little obscurity about this case, and in future whenever it is cited the remarks of the Master of the Rolls with reference to it, made in *In re Watson* (4), should be borne in mind.

We next come to the case of *French* v. *Bombernard* (5), which was an interpleader issue. In that case the defendant's landlord levied a distress on his furniture for a half-year's rent, and the landlord's broker, three days after the distress, sold the goods which he had seized to the claimants for 35*l.*, and at the same time gave them an inventory of the goods, with a receipt for the purchase-money attached thereto. At the time of the sale the claimants executed a hiring agreement to the defendant's wife, and payment had been made by her under this agreement. Four months later the defendant's landlord levied another distress for rent due, and his broker seized a fresh lot of goods, which he sold to the claimants for 43*l.* 10*s.*, for which sum he gave a receipt together with an inventory of the goods sold. Neither these nor the previous documents were registered. After the sale the claimants let these goods to the defendant's wife, and allowed these and the goods previously purchased by them to remain in the defendant's possession. The Court held that the documents formed a bill of sale and required registration. Field, J., says (6): "I think it is clear that these documents form an assurance and not a receipt. Here the sale was not by the sheriff, an independent officer, who may sell without

(1) 10 Ch. D. 80, n.
(2) 10 Ch. D. 76.
(3) 32 Ch. D. 47; 35 Ch. D. 191; 13 App. Cas, 544.
(4) 25 Q. B. D. 27, at p. 36.
(5) 60 L. T. (N.S.) 48 (Nov. 8, 1888).
(6) At page 51.

bill of sale and may pass property by delivery, but by the landlord's broker. Now a broker for a landlord has power to sell goods under certain statutory conditions, one of which is that the goods must remain on the premises five days after seizure, and cannot be sold until after the expiration of that period without the consent of the debtor. In this case the goods were sold within that period; therefore no sale could have taken place without the defendant's consent. It appears that the rent due amounted to 35*l*. One would have expected the broker to seize 50*l*. worth of goods to clear expenses; but we find that the goods were appraised at 24*l*., thereby giving the broker the right to buy them at that price, although admittedly worth more. Looking at all the facts, I think it was really a sale by the defendant, whether an absolute sale or merely a mortgage of the goods to secure the sum advanced by the claimants." Wills, J., after going through the facts at considerable length, comes to the conclusion that the sale by the broker was not really the broker's transaction, but the defendant's, and that the intervention of the broker was form and not substance; that the broker was paid out by the claimant, and that the terms on which the money should be found to pay him out were a matter of bargain, not between him and the claimant, but between the defendant and the claimant, the broker's part in the matter being confined to doing what he was told to do, and giving a receipt to the claimants for 35*l*. for the goods in question; in other words, that the transaction, whether it was a sale out and out to the claimants or an advance of money by them, was not a genuine broker's sale, but was really the execution debtor's transaction, by virtue of which he got 35*l*. to pay out the broker. "If then," says the learned judge, "the receipt and inventory were made as I think, they were purely as a piece of machinery in the sale by the execution debtor, I do not think they were the less 'made' by him, because it is in form a receipt given by the broker."

The next case is *In re Jones, Ex parte Tower Furnishing Co.* (1) There the sheriff had seized the goods of Jones under a fi. fa. for £49 17*s*. On the 17th the debtor met the manager of

(1) 61 L. T. (N.S.) 84 (May 14, 1889).

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the Tower Furnishing Company, and asked them to purchase the goods from the sheriff, and to relet them under a hire and purchase agreement to the debtor's wife, to which they assented. On June 18 an order was made by a Master with the consent of the debtor for the sheriff to sell the goods seized by private contract. On the same day the company gave a cheque for 49*l.* 17*s.* to the sheriff's officer, and thereupon an authority was given for the man in possession to go out. No receipt or inventory was then given; but the sheriff's officer promised to send them by post. A receipt for the goods was sent by the sheriff to the company the same night, and an inventory on the following day. On these facts it was held, first, that there was a bonâ fide sale by the sheriff to the company, and, secondly, that the receipt for the goods was not an assurance within the Act of 1878, and therefore did not require registration.

Then comes *In re Yarrow.* (1) As, however, that is a decision of my own, I will say no more about it than that I believe it to be in accordance with the cases I have recited. My observations in that case appear to have been somewhat misunderstood by the Court of Appeal. (2) The case of *Gapp* v. *Bond* (3), as cited to me from the shorthand notes of the judgment, appeared to go the length of deciding that where the same result was intended to be arrived at, it was immaterial, so far as the Bills of Sale Act of 1882 was concerned, whether it was got at by a mortgage, or by a sale with a right of repurchase; and I cited certain passages from *Yorkshire Railway Wagon Co.* v. *Maclure* (4), and *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (5), for the purpose of shewing that the Courts had recognized a distinction between a sale with right of repurchase and a mortgage. As I have said, I was very probably mistaken in the construction I put on the judgments in *Gapp* v. *Bond* (3); and at any rate, after the decision in *Watson's Case* (6), it is clear that the distinction between a mortgage and a sale with right of repurchase must be borne in mind in considering these cases.

(1) 59 L. J. (Q.B.) 18 (Oct. 30, 1889).
(2) See *In re Watson* (25 Q. B. D. 27).
(3) 19 Q. B. D. 200.
(4) 19 Ch. D. 478.
(5) 35 Ch. D. 191.
(6) 25 Q. B. D. 27.

The next case is the *United Forty Pound Loan Club* v. *Bexton* (1) of which I have only seen a transcript of the shorthand notes of the judgment. From those notes it appears, that on the trial of an interpleader issue in the county court in which one Miller was the claimant, it was proved that there was an anterior transaction not in writing, by which Bexton, the original owner of the goods, sold them to the club, and that afterwards the club executed a hiring agreement by which they let the goods to Bexton on the hire-purchase system. It was there contended that upon the true aspect of the case there was a mortgage and not a sale out and out; but the Court held, that however that might be, there was nothing to register, for that, whether the club were really purchasers or mortgagees of the goods, they became such by virtue of a real anterior transaction, which not being in writing could not be registered, and that as the club were thus entitled to the goods before the hire-purchase agreement was executed, the licence there given to enter the defendant's premises and seize the goods was not a licence given by Bexton as the owner of the goods to the club, but a reservation by the club as the owners of the right to resume possession of goods which had previously become theirs by virtue of the anterior transaction.

The last case is that of *In re Watson*. (2) In that case the official receiver moved in the county court for an order declaring certain goods formerly the property of the bankrupt to be his goods, as against a money-lender, who claimed them under an alleged sale to him by the bankrupt, to whom he demised them on the hire-purchase system. When this case was argued before the county court judge, counsel were not aware of the decision in the *United Forty Pound Loan Club* v. *Bexton* (1), and when that was given a shorthand note of it was, by the consent of the counsel, sent to the county court judge in order that he might consider it before giving his judgment. After considering it the county court judge found as a fact that in the case before him there was no agreement anterior to the hiring agreement, which he found to be the only agreement in the case; but although the facts so found differed from those in the *United Forty Pound Loan Club* v. *Bexton* (1) in this important point, he thought himself bound

(1) Not reported (Jan. 29, 1890). (2) 25 Q. B. D. 27.

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by that case to hold that the hiring agreement, although it was the only agreement in the case and consequently gave the money-lender the only title he had to seize Mrs. Watson's goods, did not require registration. From this judgment of the county court judge an appeal was brought by the Board of Trade in the name of the official receiver before a Divisional Court consisting of myself and my brother Lawrance. When the appeal was called on, the counsel for the Board of Trade at once stated that they could not ask us, they thought, to allow the appeal without asking us to differ from the judgment in the *United Forty Pound Loan Club* v. *Bexton* (1), and therefore they asked us without any argument to dismiss the appeal, and give them leave to appeal, which we did.

It is a mistake to suppose that we thought, the authorities being conflicting, the case was one for the Court of Appeal. The facts of *Watson's Case* (2) were not stated to us, counsel for the Board of Trade saying he could not ask us to decide in his favour, as to do so would be to overrule the *United Forty Pound Loan Club* v. *Bexton* (1), and that all he could ask us to do was to dismiss his appeal and give him leave to go to the Court of Appeal. How the counsel for the Board of Trade came to form this opinion I know not. I can only conjecture that they considered the facts in the two cases to be indistinguishable, and that either the Court in the earlier case or the county court judge in the later case had drawn a wrong inference of fact. It was open to the respondent in *Watson's Case* (2) to have contended that the county court judge had found wrongly that there was no other agreement between the parties than that contained in the document of hire and purchase. This contention, however, does not seem to have been raised by the respondent, and, as soon as it was admitted that the county court judge had found rightly on the facts, there was a clear distinction between the two cases, viz., that in the one there was an oral agreement quite independent of the hire-purchase document by which the United Loan Club had become the owners of the goods afterwards let to Bexton; while, in the other, there was no independent oral agreement at all, no agreement but that contained in the hire and purchase

(1) Not reported. (2) 25 Q. B. D. 27.

document. Although, however, *Watson's Case* (1) did not in the result raise the question which the Board of Trade sought to have determined, the Court of Appeal did in fact hold that the case of the *United Forty Pound Loan Club* v. *Bexton* (2) was rightly decided, and there are scattered throughout the judgment a number of valuable dicta which must be considered before the present case can be determined. Lord Esher, M.R., there says (3): "When the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham purchase and hiring. It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact, and afterwards the goods are hired, the case is not within the Bills of Sale Act." Cotton, L.J., says (4): "The facts are these. The bankrupt being in want of money, a friend introduced Love to her. He came to her house, and then had one of the chairs handed to him by her under the circumstances that have been mentioned; and after that she executed what purported to be a hiring agreement in respect of the furniture. The question is whether the furniture was not at the time when that agreement was executed really her property. If it was her property, the supposed hiring was a mere fiction. On the other hand, if there was a real sale to Love before the hiring, when the chair was delivered, there is no difficulty in upholding the transaction. The county court judge finds in effect that the sale and hiring was a sham and a mere pretence, and that the real transaction was that Love advanced money by way of loan and was to be secured by this agreement. That being so, the hiring agreement was a mere pretence. By the agreement it was provided that Love should be at liberty to take possession of the furniture in the event of the bankrupt doing or failing to do certain things. If the property continued hers, it is clear that this is a licence by the owner to take possession of the furniture in these events. What the county court judge has decided is that there was never any intention to give to Love any right of property independently

(1) 25 Q. B. D. 27.
(2) Not reported.
(3) At page 37.
(4) At page 38.

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of the terms of the hiring agreement. If that is so, this agreement is a licence to take possession of personal chattels as a security for a debt within the 4th section of the Bills of Sale Act, 1878." Lindley, L.J., says (1): "I think the decisions on the subject are all consistent in principle. Any supposed inconsistency really depends on differences of facts. If the conclusion is arrived at that the hiring agreement was a real letting out of goods by the real owner of them, then it is not a bill of sale; but if, as in this case, the supposed hirer is the real owner of the goods, then it has at least the effect of a licence to seize the goods of the borrower of the money as a security for the loan. If the effect of the document is that the lender of the money, and supposed lessor of the goods, can make a title to them by means of the document, by estoppel or otherwise, then the document will amount to an assurance within the Bills of Sale Act."

This, then, is the state of the authorities on this question. As I observed in *In re Yarrow* (2), all the cases are easily reconcileable, except, as it then appeared to me, the case of *Gapp* v. *Bond*. (3) After the observations of the Lords Justices in *In re Watson* (4), it must, I think, be taken that *Gapp* v. *Bond* (3) forms no exception to the general rule, and that either I was mistaken in supposing it did, or that, if it did, the Court there drew a wrong inference of fact. It is quite immaterial which is the correct view, so long as it is understood that *Gapp* v. *Bond* (3) must be taken to be consistent with all the other cases.

What, then, are the principles which have been laid down in these cases? If I understand the cases correctly, they are these. A man who is possessed of personal property, and is desirous of raising money by means of such property, may do so in one or other of the following ways: he may sell it, or he may mortgage it, or he may pledge it; and, further, if he sells it, he may do so either absolutely or conditionally. For the present purpose we may neglect the modes of raising money by absolute sale or by pledge, and may confine ourselves to the other two modes, viz., conditional sale and mortgage. Now both these methods of

(1) At page 39.
(2) 59 L. J. (Q.B.) 18.
(3) 19 Q. B. D. 200.
(4) 25 Q. B. D. 27.

dealing with property are well known to the law. As Lord Macnaghten says, in *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1): "There is all the difference in the world between a mortgage and a sale with a right of repurchase. But, if the transaction is completed by redemption or repurchase, as the case may require, there is no difference in the actual result." In a conditional sale there is an actual sale, which, for all the purchaser can do, may be absolute, but as part of which there is a condition which the vendor may take advantage of, if he pleases, to re-vest the property in himself. No doubt both parties contemplate the probability of the vendor taking advantage of the condition; and the existence of such a condition renders the vendor more indifferent as to the price fixed for the goods. In a conditional sale there is usually a period at which the purchaser, having paid the price and received the goods, has no further rights against the vendor, although the vendor, on the other hand, has a right, if he thinks fit to exercise it, to repurchase the goods subject to the terms of the condition. It is no doubt true that the party entitled to repurchase may agree to repurchase at once; but the non-existence of such period, especially where the original vendor is a poor or ignorant man, is a circumstance of suspicion. In a mortgage, on the other hand, there is no sale of the goods, and there is a debt always due from the mortgagor to the mortgagee, until it has been satisfied by payment or foreclosure. No doubt, if the vendor in the first case repurchases under the condition, or if the mortgagor in the second case redeems under the redemption clause, the final result of each transaction is the same; but that does not affect the nature of the transaction, and a conditional sale is not a mortgage simply because both parties enter into the transaction in the confident expectation that the purchaser will take advantage of the condition, and that the final result will be the same as if they had agreed to reach that end by the road of mortgage.

The real question to be decided is, What is the intention of the parties? And to answer this question we must have regard to the form of the transaction, but more particularly to the

(1) 13 App. Cas. 554.

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substance, the position of the parties, and the whole of the circumstances under which the transaction came about. Now, let us apply these principles to the present case. In the first place, it is clear that the transaction was one between Beckett and the company, and that the friendly distress by the landlord and the letting to Mrs. Beckett were shams only intended to disguise the real nature of the transaction. On this point I need only refer to the observations of Wills, J., in *French* v. *Bombernard*. (1) The transaction, as I have said, was one between the plaintiff and the defendants, and not between Reape, his landlord, and the defendants. At first it is plain that Beckett contemplated a mortgage; but, when it was suggested on behalf of the defendants that the same result might be arrived at without publicity by means of a conditional sale, Beckett assented to the proposal to raise money by this method. On the 17th the broker, as Beckett's agent, and with Beckett's consent, sold the goods in question to the defendants for 29*l.* 5*s.*, there being then an understanding that Beckett should be allowed to repurchase them on the purchase-hire system on terms which had not been definitely agreed upon. On the next day Beckett and his wife went to the defendants to sign the hire-purchase agreement. On its production Beckett objected to the terms; whereon the company's representative said, "You can please yourself; we have bought the goods, and you know whether they are worth 50*l.*" (the price they were asking for the repurchase) "or not." Whereupon said Beckett, "I saw how I was placed"; and he then agreed to their terms. I am unable to understand this in any other way than as an assertion by the company and an admission by Beckett that there had been an actual sale to the company on the day before, that Beckett could if he pleased leave the goods on the company's hands and retain the money he had got for them, but that if he wished to repurchase them he must agree to their terms, that is, to pay substantially the same sum which he would have had to pay for principal and interest on a loan of 30*l.*, if the transaction had been carried out by way of mortgage. Looking at the terms contained in the hire-purchase agreement, I find there nothing which might not reasonably have

(1) 60 L. T. (N.S.) 48.

been inserted if the goods had originally belonged to the company and had been let by them to Beckett on the hire-purchase system. Beckett does not say that he understood the transaction in any other way than as a sale and repurchase transaction; and I think both parties intended that there should be a sale subject to a right of repurchase on substantially similar terms to those which would have been imposed in the case of a mortgage. In my opinion, the company could not on the morning of the 18th of June have compelled Beckett to pay them 50*l.* or any other sum. The real transaction, in my opinion, was a sale on the 17th, subject to a right on Beckett's part to repurchase on the terms I have mentioned, and I think that there was not on the 17th any debt existing from Beckett to the company or any obligation on him to repurchase the goods. It may be said that Beckett's language shews too much, viz., that there was not even a conditional sale, but that he supposed it to be absolute, which was not what the parties intended. But the explanation of this is, that Beckett had supposed that if he consented to a sale he would be allowed to repurchase on terms slightly more favourable than if he had mortgaged the goods. There had not in fact, however, been any such agreement, and Beckett therefore felt himself obliged to consent to a repurchase on the terms proposed by the defendants, or to give up the right to repurchase altogether. But whether the real transaction in this case was a sale or a mortgage, it seems to me to be clear that there is not here any document which requires registration under the Bills of Sale Acts. There was in fact an oral agreement on the 17th by virtue of which the company became the owners or the mortgagees of the goods in question. The receipt given by the broker for 29*l.* 5*s.* was certainly not a record of that transaction. Neither is the agreement of the 18th a record of the transaction of the 17th. The company were entitled to seize these goods by virtue of a right which they acquired on the 17th, and which they reserved to themselves when they let the goods on the 18th. The right to seize arose out of the rights they had acquired on the 17th, and was not conferred on them by Beckett by virtue of the agreement of the 18th. On this part of the case I need only refer to the

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observations of Fry, L.J., in the *United Forty Pound Loan Club* v. *Bexton* (1), in which I respectfully concur.

The plaintiff fails in his contention, and there must be judgment for the defendants with costs.

Judgment for the defendants.

Solicitor for the plaintiff: *Pumfrey.*

Solicitors for the defendants: *Evans & Batchelor.*

H. D. W.

(1) Jan. 29, 1890.

THE UNITED FORTY POUND LOAN CLUB *v.* BEXTON.

FRY, L.J. Then the second point which has been discussed is this, Did any property pass from the original owner of these goods, the defendant, to Miller? It has been forcibly argued before us that the terms of the instrument of hiring cast a doubt upon the question of whether or no the anterior transaction, which is said to have been one of sale out and out, was or was not a sale out and out. But, nevertheless, it seems to me that that point must be determined against the defendant, because, whichever view I take of the transaction, it appears to me that it was the intention of the parties that the property should pass. Of course, as the transaction is for valuable consideration, the question of whether the property passes or not is a question of the intention of the parties. Now, if it was the true intention of the parties expressed by the agreements in the form in which they are expressed, it is plain that the first of these transactions was a sale out and out. If so, the property passed. But if it was not this, then it was a transaction by way of mortgage, and the property was intended to pass in order to give effect to the mortgage, although in that event an equity of redemption would be reserved to the original grantor. In any event it was intended that the legal estate should pass. In one event there would be no equity of redemption, and in the other event there would be an equity of redemption; and therefore, quâcunque viâ, it was the intention of the parties that the property should pass.

The third question which then arises is this, whether the instrument which has been executed by the parties, which is a hiring and sale agreement, does require registration under the Bills of Sale Acts. Now, it is to be borne in mind that those statutes do not require that any transaction shall be put in writing; they only require that if a transaction be put in writing and be of a particular character, then that it shall be registered, otherwise it shall be void. Where there is a document the Court has to consider the true nature of the document, and if, on consideration of its true nature, they arrive at the conclusion that it comes within the description of one of the documents enumerated in the definition of bills of sale, then it requires registration. An illustration of that class of cases is to be found in *Ex parte Odell* (10 Ch. D 80), where there were two documents, and the Court came to the conclusion the true meaning of them was a security, and held that it required registration. In the present case we have only one

[IN THE COURT OF APPEAL.]

1890
Oct. 28.

BIRD *v.* DAVEY.
MARCH, CLAIMANT.

Bill of Sale—Attesting Witness, Address and Description of—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule, Deviation from.*

The form in the schedule to the Bills of Sale Act, 1882, requires the address and description of the witness attesting the execution of a bill of sale by the grantor to be given. A bill of sale had two attestation clauses, attesting the execution of the instrument by different grantors respectively. The signature to both clauses was the same, and in one of them the address and description of the attesting witness were given, but in the other they were not. An irresistible inference, in the opinion of the Court, arose from what appeared on the face of the bill of sale that the witness in the two attestation clauses was the same person :—

Held (reversing the judgment of the Queen's Bench Division), that the bill of sale sufficiently complied with the form.

APPEAL from an order of the Queen's Bench Division (Pollock, B., and Day, J.), reversing the judgment of a county court judge upon an interpleader issue.

The facts were as follows. Goods having been taken in execution were claimed by the grantee of a bill of sale, and the question was whether the bill of sale was good. The grantors of

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document, and what we have to inquire is whether that document is one which under the statute requires registration. Now Mr. Stanger, who argued this case with great ability and clearness, admitted that he could not bring the document within any of the descriptions of documents in the definition clause of the Act of 1878. The only one which appeared to me to require any attention was expressed in the words "licence to take possession of personal chattels as security for any debt." But I think Mr. Graham was right when he said that that means a licence by the owner of the property to the person who advances money to take possession of the chattels which remain in the custody of the owner. That is not the nature of this transaction, because the only licence which is to be found in the instrument is a licence to the person who is described as the owner to take possession of his own chattels. The object of that is, no doubt, to justify him in going on property of the person in whose possession the chattels may be, and is not intended to create a security itself. I think, therefore, those words in the Bills of Sale Act do not apply, and consequently the instrument does not require registration.

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the bill of sale were Eliza Newton and Theophilus Davey and Emily his wife. The execution by the grantors respectively was attested by two attestation clauses as follows:—"Signed, sealed, and delivered by the above-named Theophilus Davey, in the presence of me, the alterations initialled by me having been first made. Geo. Bailey, solicitor, Romford." "Signed, sealed, and delivered by the above-named Eliza Newton and Emily Davey, in the presence of me, the alterations initialled by me having been first made. Geo. Bailey." It was apparent on the face of the bill of sale that, as originally engrossed, it purported to be given by Theophilus Davey only, and that originally there was but one attestation clause, but that it had been altered by adding the other grantors as parties, and making the other alterations and additions necessary in consequence. Such alterations were in each case initialled once only with the initials "G. B." The first attestation clause had been altered by the addition of the words, "the alterations initialled, &c.," and the second attestation clause added, the handwriting of such additions and of the two signatures to the attestation clauses being obviously exactly similar. It was contended for the execution creditor that the bill of sale was void, as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), on the ground that the address and description of the witness attesting the execution of the bill of sale by Eliza Newton and Emily Davey were not given. The county court judge held the bill of sale good, and gave judgment for the claimant; but the Divisional Court, thinking the case governed by *Parsons* v. *Brand* (1), reversed his decision.

C. E. Jones, for the claimant. The bill of sale substantially complies with the form. The address and description of the attesting witness, though not stated in the second attestation clause, nevertheless sufficiently appear on the face of the bill of sale. The address and description of the witness who signs the first attestation clause are given, and the two attestation clauses may be read together, it sufficiently appearing from the handwriting of the signatures and alterations, and from the initialling

(1) 25 Q. B. D. 110.

of the alterations, that the George Bailey who signed the second attestation clause is the same person who signed the first. [He cited *Parsons* v. *Brand* (1) and *Blankenstein* v. *Robertson*. (2)]

Lynden Bell, for the execution creditor. The bill of sale is void on two grounds. First, even assuming that the address and description of the witness do appear on the face of the instrument in the manner suggested by the counsel for the claimant, the bill of sale departs from the statutory form, because the form requires that the address and description should be given in the attestation clause itself, after the name of the witness signing it. Therefore, if they be only given by reference to a previous attestation clause, that would not be in accordance with the form.

Secondly. Assuming that it would suffice if the information were clearly deducible from any part of the document, the address and description of the witness do not appear on the face of the bill of sale as suggested. There is nothing in the bill of sale which states that the George Bailey who signed the second attestation clause is the same person as the George Bailey who signed the first. There is nothing in the terms of the bill of sale that identifies them as the same persons, and it cannot be presumed that they are. The similarity of handwriting will not suffice. The object of the provision is to give information to the public, identifying the person. The public never see the original bill of sale, but only the copy filed with the registrar.

[LORD ESHER, M.R. The provision of the Act relates to the bill of sale, and is satisfied if the bill of sale gives the particulars required by the form.]

C. E. Jones, in reply.

LORD ESHER, M.R. The question is, whether this bill of sale is in accordance with the form prescribed by the statute. It was contended for the execution creditor that it was not, because the address and description of the witness were not given in the second attestation clause. If such address and description do not appear on the face of the bill of sale, it is not in accordance with the form, although it might appear from the affidavit filed on the registration or from other evidence that such witness was

(1) 25 Q. B. D. 110. (2) 24 Q. B. D. 543.

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the same person as the witness who signed the first attestation clause, and whose address and description are therein mentioned. The effect of the Act is that the name, address, and description of the attesting witness must appear on the face of the bill of sale. The question, therefore, is whether they do so appear in this case. In the first attestation clause the attesting witness has signed his name, George Bailey, and described himself as a solicitor of Romford. Then in the second attestation clause the witness has signed his name George Bailey only. If there is only one George Bailey who attested the execution by the grantors, then, of course, the address and description given in the first attestation clause are the address and description of the witness signing the second attestation clause. If any extraneous evidence were necessary to shew that the two signatures were those of the same man, I should say that such evidence could not be given either by reference to the affidavit or otherwise, and that the requirements of the Act had not been satisfied. But if, on looking at what appears on the face of the bill of sale, the inference is irresistible, so that the Court can have no doubt, that it was the same man who signed both attestation clauses, then the result is that the address and description of the attesting witness to the second attestation clause are given on the face of the bill of sale. To say that the address and description must be given in any particular order, as suggested by the counsel for the execution creditor in his first contention, would, I think, be construing the Act too strictly. If the Court were not perfectly satisfied that the inference from the handwriting itself is irresistible that the two signatures are those of the same person, and if it were necessary to call evidence of experts to shew this, I do not think that could be done. But if, on looking at the bill of sale, the handwriting is so clearly that of the same person that the Court can have no doubt that it is so, then on the face of the bill of sale it appears that there is only one attesting witness, whose address and description are given. In this case each member of the Court, on looking at the bill of sale, has not the smallest doubt that the evidence is irresistible that the two attestation clauses are signed by the same person. Under these circumstances, the case is distinguishable from

Parsons v. *Brand*. (1) I think for these reasons that the appeal must be allowed.

LINDLEY, L.J. I am of the same opinion. The members of the Divisional Court appear to have thought themselves bound by the decision in the case of *Parsons* v. *Brand* (1) to decide otherwise than they would have decided but for that decision. But I think that the decision in that case is not inconsistent with that which we are giving in the present case. In that case it was held that the bill of sale cannot be supplemented by reference to the affidavit filed on the registration, but the address and description of the attesting witness must appear from the bill of sale itself without the necessity for having recourse to any external evidence. Sect. 9 of the Bills of Sale Act, 1882, says that a bill of sale given by way of security for the payment of money shall be void, unless it is in accordance with the form in the schedule, and s. 10 says that the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. The only question in this case is, whether the execution of the bill of sale by two of the grantors, is attested in accordance with the form in the schedule. The form in the schedule says: "Add witness's name, address, and description." Therefore, the name, address, and description must appear on the face of the instrument and in the attestation clause somewhere; but the Act does not say that, where the same witness is attesting several signatures, he must set out his address and description as often as he attests. I cannot bring myself to think that the Act requires such strictness as that. If it plainly appear on the face of the instrument that it is the same witness that is attesting in each case, and his address and description be given once, it appears to me to be sufficient. In *Thomas* v. *Kelly* (2), Lord Macnaghten in his judgment says: "The words of the Act are, 'in accordance with the form,' not 'in the form.' But then comes the question, When is an instrument, which purports to be a bill of sale, not in accordance with the statutory form? Possibly, when it departs from the statutory form in

(1) 25 Q. B. D. 110. (2) 13 App. Cas. 506, at p. 520.

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Lindley, L.J.

anything which is not merely a matter of verbal difference. Certainly, I should say, when it departs from the statutory form in anything which is a characteristic of that form." Applying the paraphrase of the Act there given and one's common sense to this bill of sale, can one say that it is not "in accordance with the form"? If it were doubtful on the face of the document, whether the witness signing the second attestation clause was the same man who signed the first attestation clause, the case would be different; but I feel irresistibly forced by what appears on the face of the instrument to the conclusion that the two signatures are those of the same person.

LOPES, L.J. If from what appears on the face of the bill of sale without any external evidence, an irresistible inference arises, there is nothing, I think, to prevent us from drawing that inference. Applying that to the present case, the question is whether an irresistible inference arises from what appears on the face of the instrument, that the George Bailey who signed the first attestation clause, and whose address and description are given, is the same George Bailey who signed the second attestation clause. Looking at the bill of sale, I am of opinion that an irresistible inference does arise to that effect, and, therefore, the bill of sale is in accordance with the form. The judges in the Court below acted on the decision in the cases of *Parsons* v. *Brand*, and *Coulson* v. *Dickson*. (1) I think, however, that the decision in those cases is distinguishable from the decision we are giving in this case. In one of those cases neither the address nor the description of the witness was given in the bill of sale; in the other, the address was given but not the description. The Court held that the bill of sale could not be aided by anything found in the affidavit, and that it was void, because it was not in the statutory form. For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors for claimant: *A. H. Hunt & Co.*

Solicitor for execution creditor: *Roland H. Ward.*

E. I..

(1) 25 Q. B. D. 110.

[IN THE COURT OF APPEAL.]

1890
Oct. 31.

BUDGETT & CO. *v.* BINNINGTON & CO.

Ship—Bill of Lading—Charterparty—Demurrage—Fixed Number of Lay-days—Delay occasioned by Strike—Inability to perform Ship's Share of Unloading—Liability of Consignee.

A cargo was shipped under a bill of lading incorporating a clause in the charterparty which fixed the number of lay-days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charterparty contained any exception of strikes. By the custom of the port of discharge a cargo, such as that to be unloaded was discharged by the joint act of the shipowner and the consignees. During the lay-days a strike took place, both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay-days:—

Held, affirming the judgment of the Queen's Bench Division, that as the number of lay-days was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners, owing to the strike, to do their part in the unloading.

APPEAL from the judgment of the Queen's Bench Division. (1)

In this action, which was tried at Bristol before Cave, J., with a jury, the plaintiffs, who were indorsees of the bill of lading for a cargo of barley shipped on board the defendants' steamship *Fairfield*, sought to recover a sum of money paid by them under protest in respect of a claim of the defendants for demurrage.

The bill of lading contained a clause, "all conditions as per charterparty"; and by the charterparty the cargo was to be brought and taken from alongside the steamer at freighter's expense and risk, and a fixed number of lay-days was allowed, with ten days on demurrage over and above the lay-days. The bill of lading contained the usual exceptions; but neither the bill of lading nor the charterparty contained any reference to strikes. The ship arrived at Bristol and commenced to discharge. According to the custom of that port such a cargo as that carried by the ship is ordinarily discharged by the joint action of the consignees and the shipowner, the former providing sacks and

(1) 25 Q. B. D. 320.

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loading the grain into them in the hold, and the latter delivering the sacks over the side of the ship. The defendants employed a firm of stevedores who engaged dock-labourers. A part of the cargo was discharged and the lay-days were still running when the dock-labourers—both those employed on behalf of the ship and those engaged by the consignees—struck, and the discharge of the cargo was suspended. After the lay-days were over the strike ended and the discharge was resumed. The defendants claimed demurrage for the days from the expiration of the lay-days until the completion of the unloading, and exercised their lien on the cargo in respect of the amount of their claim, which was paid under protest by the plaintiffs, who brought this action to recover it back.

At the trial the parties were left to move for judgment, and the Queen's Bench Division directed that judgment should be entered for the defendants. (1)

The plaintiffs appealed.

Cohen, Q.C., and *Pyke* (*E. U. Bullen*, with them), for the plaintiffs. It is a condition precedent to the claim for demurrage that the shipowners should be ready to perform their duty under the contract in assisting to unload the ship. They were in default, and the fact that this arose by reason of a strike of men engaged by the stevedores employed on behalf of the ship does not render it any the less a breach of contract. If a man contracts to do certain things he cannot absolve himself from liability by employing a sub-contractor. It is true, but not material, that the consignees were also unable to perform their part of the contract. The question is, whether the shipowner who is in default can recover demurrage. *Thiis* v. *Byers* (2) is distinguishable, and a strike is not an "ordinary vicissitude" within the meaning of that decision. Further, there is a distinction between a default arising from bad weather or other things over which the shipowner can have no control and default arising from acts of persons for whom the shipowner is responsible. They cited *Nelson* v. *Dahl* (3); *Straker* v. *Kidd* (4); *Randall* v.

(1) 25 Q. B. D. 320.
(2) 1 Q. B. D. 244.
(3) 12 Ch. D. 568.
(4) 3 Q. B. D. 223.

Lynch (1); *Leer* v. *Yates* (2); *Ford* v. *Cotesworth* (3); *Benson* v. *Blunt* (4); *Furnell* v. *Thomas* (5); *Hansen* v. *Donaldson.* (6)

Bucknill, Q.C., and *J. V. Austin*, for the defendants. The contract to pay demurrage is an absolute contract except so far as the delay may be caused by the default of the shipowner or his servants: *Thiis* v. *Byers.* (7) The stevedores' men who were to do the ship's share of the unloading were not employed by the shipowners, and were not their servants, and consequently if the act of those men caused the delay in unloading the shipowners are not responsible. Even assuming that the shipowners were responsible for the act of the dock-hands in refusing to work, still by the custom of the port the first part of the work of discharging—that is, putting the grain into bags—was to be done by the consignees, who were unable to perform it. Therefore, the failure to be ready to do the ship's part in discharging was not the efficient cause of the delay, but the strike, which affected both parties and prevented the carrying out of the contract. [They cited *Ericson* v. *Barkworth* (8); *Postlethwaite* v. *Freeland* (9); *Porteus* v. *Watney.* (10)]

Cohen, in reply.

Lord Esher, M.R. In this case the plaintiffs, the consignees of goods, seek to recover back from the defendants, the shipowners, money which the latter claimed for demurrage at the port of discharge under the stipulations of the bill of lading. There are many stipulations in the bill of lading, some on the part of the shipowner, and some on the part of the freighter, and there are different and independent contracts by each. This is a contract by the freighter, by which he undertakes, under certain circumstances, to pay demurrage. It occurs in a document which is in constant use, and the stipulation is in an ordinary form, and has been construed frequently. It has been held that the demurrage contract, where a fixed number of lay-days is mentioned,

(1) 2 Camp. 352.
(2) 3 Taunt. 387.
(3) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(4) 1 Q. B. 870.
(5) 5 Bing. 188.
(6) 1 Scotch Sess. Cas. 4th Series, 1066.
(7) 1 Q. B. D. 244.
(8) 28 L. J. Ex. 95; 3 H. & N. 894.
(9) 5 App. Cas. 599.
(10) 3 Q. B. D. 227, 534.

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is a contract by the freighter, that if the ship is detained over those days he will pay demurrage for so long as the ship is in such a condition that she cannot be handed back for the use of the shipper. This has been called an absolute and independent contract, and it is obvious that a contrast is intended to be drawn between such a contract and a conditional one, and that by an absolute contract is meant an unconditional one. The only condition attached to it is that the lay-days shall have commenced and run out, and, that condition being fulfilled, the obligation arises. Directly the shipowner shews this state of facts, he has proved his case, and it lies on the other side to shew, not that there has been no breach of contract, but that he is excused from the performance—in other words, his case is one of confession and avoidance, and the whole burden of proof is on him. Speaking generally of all contracts, a breach is excused where the party committing the breach has been prevented by the other side from carrying out his contract. Here the condition is that the cargo should be out of the ship in a certain number of days; and if the shipowner, by any act of his, has prevented the discharge, then, though the freighter's contract is broken, he is excused. It is said in this case that the delivery of the cargo is the joint act of the shipowner and the consignee, and that, if so, the shipper has not fulfilled his part, and so has prevented the performance of the contract of the consignee. The delivery of a cargo is undoubtedly the joint act of the shipowner and the merchant freighter; but naturally it is open to the parties to regulate the share in the discharge to be taken by either of them. In this case, the share to be taken has been regulated by custom, and the merchant freighter has not to begin his part, as is usually the case, when the cargo is brought to the rail of the ship. Such a course in the case of grain in bulk would be inconvenient, and so the merchant freighter supplies sacks, and loads the grain in the hold; and then the shipowner resumes his ordinary duty, which is delivery over the ship's side. Now, has the shipowner failed in this duty through any default of his own, or of persons for whom he is responsible? The persons for whom he is responsible are the persons who represent him in his absence. If, for instance, the master refused to discharge the cargo, the

owner would be responsible. How much further this rule of liability extends I am not prepared to say—whether, for instance, it extends to the case of the crew refusing to work; but of this I am certain, that if the shipowner is prevented from carrying out his share of the discharge by the acts of persons over whom he has no control, the case comes within the same category as the case of non-delivery caused by some physical misfortune over which he has no control. In such a case, it has been decided that he is not prevented from enforcing the contract of the freighter—as, for instance, in the case of prevention by weather or the acts of other consignees preventing a lower cargo being taken out of the vessel. This rule has been laid down in a number of cases—not only cases in which the lay-days are fixed, but cases in which the number of lay-days is not fixed, so that questions arise in respect of what is a reasonable time to elapse before the liability of the consignee attaches. In these latter cases all the circumstances have to be taken into consideration; but even in such cases the judges have recognized the rule, applicable to cases where the lay-days are fixed, to the effect which I have stated. That reduces the matter to the question whether there has been default by any persons for whom the defendants are responsible. The non-delivery, in fact, was occasioned, as was put by my brother Lopes in the course of the argument, by something which the defendants could not foresee, and by the act of persons over whom they had no control. It was caused by the act of the workmen employed by the stevedore, and by their breach of contract with their employers. The shipowner had no control over these workmen, and is not responsible for the consequences of their acts, and consequently there is nothing to relieve the consignee from the absolute contract to pay demurrage. This is no new principle of law, but only a question whether the facts bring this case within a recognized rule of law. I am of opinion that the Court below were right in their application of that rule, and that this appeal must be dismissed.

LINDLEY, L.J. The question raised in this case is one of importance, and may be put in this way—on whom does the risk of

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BUDGETT & Co. v. BINNINGTON & Co.

Lindley, L.J.

strikes fall in a contract such as this, in which that risk is not expressly excepted from the risks which the freighter is to bear? The contract was to discharge the ship in a certain number of days, according to the terms of the charterparty; and there was a further stipulation that the charterer was to take the risk of unloading the cargo from alongside the ship. This stipulation is in terms unconditional, and it has frequently been called an absolute contract, by which I understand an unconditional contract. What we have to consider is whether there is any implied condition attached to this contract. It is argued that there is such a condition, and that it may be expressed by saying that the shipowner shall be able and willing to do his part in the unloading, and that, if he is not so able and willing, the freighter is relieved from the consequences of a breach on his part. Such a statement is far too wide; for, if it were true, the cases of *Thiis* v. *Byers* (1); *Porteus* v. *Watney* (2); and *Straker* v. *Kidd* (3), would have been improperly decided. I agree that there is an implied term in the contract, and that is, that the shipowner shall not prevent the freighter from performing his part of the contract; and if it is shewn that this has happened, the freighter is discharged. This is a general principle, applicable to all contracts, including maritime ones. In this case, I protest against the idea of the shipowner being held responsible for a strike of the dock-labourers. He does not hire them; he cannot discharge them; and in no sense are they his servants; and it cannot be said that, by reason of the strike, the shipowner has prevented the freighter from performing his part of the contract. I, therefore, agree that the appeal should be dismissed.

LOPES, L.J. This action is by merchants against shipowner to recover back demurrage paid by the plaintiffs under protest. The facts have been stated and I will not restate them; but I wish shortly to express my opinion upon the case, which is an important one.

Three questions arise. First, what is the contract? second, has there been a breach of it? and, third, is that breach excused?

(1) 1 Q. B. D. 244. (2) 3 Q. B. D. 227, 534.
(3) 3 Q. B. D. 223.

The contract is an absolute and independent contract, and not a conditional one. It is a contract creating an absolute obligation in the merchant to have the goods unloaded within a specified time, whatever the circumstances may be, unless the shipowner, or those for whom he is responsible, are in fault. There is an essential difference between cases where a specific time is allowed for loading and unloading, and cases where the lay-days are not defined. In the former cases the time is limited without reference to subsequent events; in the latter, the question whether the merchant has been duly diligent must be determined by reference to the conditions under which he has actually worked.

This is then, as I have said, an absolute contract on the part of the merchant to have the cargo unloaded within a specified time. In such a case the merchant takes the risk. The contract is, to use the words of the Master of the Rolls in *Porteus* v. *Watney* (1), "that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner." If such is the contract it is clear that the plaintiffs have broken it. But it is said that the breach is excused because it is attributable to the default of the ship. If that could be made out it would establish the plaintiffs' case. How does this matter stand? The master, at the port of Bristol, employed a stevedore, who employed dock-labourers. It is not suggested that the master was wanting in care and caution in the selection that he made. The dock-labourers, however, struck, as also did the dock-labourers employed by the plaintiffs. It is said that the ship is responsible for the conduct of the dock-labourers. I cannot come to this conclusion. I can find no default in the ship. The strike was an unforeseen occurrence over which the ship had no control. It was an event which the master had no reason to anticipate—an event which no reasonable care and caution on his part could have prevented. It was, to use the expression I used during the argument which has been approved by the Master of the Rolls in his judgment, an unforeseen occurrence and nobody's fault, and

(1) 3 Q. B. D. 534, at p. 543.

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Lopes, L.J.

was in my opinion one of those risks which the merchant contracted to bear; just as much as in *Randall* v. *Lynch* (1) it was held he should bear the risk of delay arising from the crowded state of the place at which the ship was to load or discharge; or the risk of frost, as in *Barret* v. *Dutton* (2); or the risk of bad weather preventing access to the ship, as in *Thiis* v. *Byers* (3); or the consequences of the acts of the government of the place prohibiting export or preventing communication with the ship, as in *Barker* v. *Hodgson*. (4) I can, therefore, find no fault in the shipowner, or those for whom he is responsible, which can excuse the breach of contract by the plaintiffs, and their appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs: *Whites & Co., for Henry Brittan & Co., Bristol.*

Solicitors for the defendants: *W. A. Crump & Son.*

A. M.

Nov. 14.

SMITH, HILL & CO. *v.* PYMAN, BELL & CO.

Ship—Charterparty—Advance Freight to be paid "if required"—Requirement first made after Loss of Cargo—Liability of Charterer.

A cargo was shipped under a charterparty which contained the following clause: "One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." Shortly after the commencement of the voyage the vessel was wrecked and the cargo lost. Subsequently to the loss, and not before, the shipowner required payment of advance freight under the above clause:—

Held, that the requirement was not too late, and that the charterer was liable to pay it.

FURTHER CONSIDERATION, before Charles, J.

The action was brought to recover a sum of 245*l.* for advance freight. By a charterparty dated November 30, 1888, the defendants chartered the plaintiffs' ship *Gamma*, to load a cargo of coals at Hull and proceed therewith to Odessa, the freight to be paid on unloading and right delivery of the cargo. The

(1) 2 Camp. 352.
(2) 4 Camp. 333.
(3) 1 Q. B. D. 244.
(4) 3 M. & S. 267.

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charterparty contained, amongst others, the following provisions: "The captain or owners shall sign charterers' bills of lading as presented," and "one-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." The *Gamma* having loaded her cargo of coals, left Hull on the morning of December 19. At that time the defendants had not presented bills of lading for signature, and for this reason—the coals were sent straight down from the colliery to the ship, and until the invoices arrived from the colliery it was unknown to the parties what amount had been shipped, and, consequently, what amount was to be inserted in the bills of lading; and the invoices, which were made out in the usual manner and without any unreasonable delay, did not arrive until after the ship had sailed. Within three-quarters of an hour after she started the *Gamma* took the ground, and in the course of the same day broke her back, and, together with her cargo, was totally lost. Shortly after the loss the bills of lading, together with the colliery invoices, were sent to the plaintiffs, and the plaintiffs thereupon demanded one-third of the freight as advance freight, but the defendants refused to pay.

It appeared that, in the previous September, the defendants had, under a charterparty identical in terms with the present, chartered the same ship of the plaintiffs for another voyage between the same ports, and on that occasion the same course was adopted between the parties as on the present—the bills of lading were not presented for signature, and the advance freight was not demanded until after the arrival of the colliery invoices, which was not until after the vessel started. This, it appeared, was in accordance with the usual practice of the port.

The action came on for trial before Charles, J., without a jury, at the Leeds Summer Assizes, 1890, when the above facts were admitted or proved, and the judge reserved the case for further consideration.

Cyril Dodd, Q.C., and *Montague Lush*, for the plaintiffs. The consideration for the payment of advance freight is not the success of the voyage. Advance freight is "money to be paid for taking the goods on board, and undertaking to carry, and not

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for carrying them": per Lord Kingsdown, *Kirchner* v. *Venus* (1); per Blackburn, J., *Alison* v. *Bristol Marine Insurance Co.* (2); *Andrew* v. *Moorhouse*. (3) Consequently, money paid for advance freight cannot be recovered back by the charterer, although the vessel be lost; and, further, money agreed to be paid for advance freight may be recovered by the shipowner even after the loss of of the vessel: *Byrne* v. *Schiller*. (4) The words "if required" are immaterial; the requirement may be made at any time. But even if the clause is to be read as meaning that the requirement is to be made within a reasonable time, it was so made here; for the shipowner could not tell what quantity of coals had been shipped on board, and, consequently, how much money he was to demand for advance freight, until the bills of lading were presented for signature, which had not been done at the time of the loss.

Lawson Walton, *Q.C.*, and *Robson*, for the defendants. It was too late to require payment of the advance freight after the loss of the ship. The cases referred to are distinguishable, for there the words "if required" did not occur in the charterparty, and the obligation to pay the advance freight accrued immediately that the charterparty was signed. Here the obligation could only arise after requirement, which had not been made at the date of the loss. Though the loss of the ship, no doubt, does not destroy such unqualified obligations of the charterer as have already accrued, it does prevent the shipowner from imposing fresh obligations upon him. The object with which the words "if required" were inserted here was to allow the charterer the opportunity of insuring the amount paid by him for advance freight, and securing that he should not have paid it for nothing, and the deduction of the 3 per cent. was for the very purpose of enabling him to pay the premium on such insurance. But in the present case the possibility of insuring the advance freight was gone at the time when the shipowner elected to demand it.

Dodd, *Q.C.*, in reply. The allowance of the 3 per cent. for insurance was not for the purpose of enabling the charterer to insure the sum payable for advance freight, but was made simply

(1) 12 Moo. P. C. at p. 390.
(2) 1 App. Cas. at p. 229.
(3) 5 Taunt. 435.
(4) Law Rep. 6 Ex. 319.

because the shipowner did not want it, inasmuch as he had proportionately less freight to insure.

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CHARLES, J. In this case the plaintiffs seek to recover from the defendants the sum of 245*l.*, payable under a charterparty dated November 30, 1888, as advance freight of coal shipped on board the plaintiffs' ship *Gamma*. The facts, which were not in dispute, raise a question of law on the true construction of the charterparty. The vessel was chartered by the defendants to proceed from Hull to Odessa with a cargo of coal. She was loaded with coal, and upon the morning of December 19 she sailed from Hull, but about three-quarters of an hour afterwards she took the ground; in the course of the same afternoon she broke her back, and this was the end of the voyage so far as the carriage of the cargo was concerned. After the vessel had thus been lost, the charterers' bills of lading were brought to the plaintiffs, together with the colliery invoices of the coal, and thereupon one-third of the freight in advance was asked for; but payment was refused upon the ground that the vessel had become a wreck, and therefore, the adventure having come to an end, the whole commercial object of the voyage was frustrated, and no obligation rested on the charterers to pay advance freight.

Now the clause with reference to advance freight is in these words: "One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." It was admitted that, on the previous occasion on which the defendants had chartered this vessel of the plaintiffs for the carriage of coal, the requirement of advance freight was not made until the presentation of the bills of lading, and that the bills of lading were not presented until after the vessel had sailed. This contingency of the bills of lading not being ready for presentment until after the vessel had sailed was expressly provided for by the charterparty, which said that the captain "or owners" should sign the charterers' bills of lading as presented. So far from the requirement of advance freight in the present case having been made at a time which was unusual or abnormal, it was made in accordance with what had been done by the parties on the previous occasion, and also with the usual practice of the port.

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But now comes the difficulty. At the time when the requirement was made the vessel had become a wreck, and the whole object of the voyage was frustrated, and it was contended that it was then too late to make the requirement. And that argument was supported by reference to the terms of the clause dealing with advance freight, by which it was provided that the freight, "if required," was to be advanced, "less 3 per cent. for interest and insurance," thereby indicating, as it was argued, that the requirement must be made at a time when it is still possible to insure the sum paid for advance freight. Now, in order to arrive at a solution of this question, it is necessary to ask one's self what advance freight is. Freight, of course, is money paid for the safe carriage of the goods. But advance freight has been decided over and over again o be a payment made for taking the goods on board, and for the undertaking to carry, not for the safe carriage of them; and, that being the nature of advance freight, it has been held—first, that if it has been paid in advance, it cannot be got back again, even though the vessel be lost: and, secondly, that if there has been an unconditional agreement to pay advance freight, that agreement can be enforced although the vessel has been lost before action brought or demand made. Now, those two propositions of law go a long way towards deciding the present case; and the only difficulty I have felt about it is that the charterparty does not here impose upon the charterer an unconditional obligation to pay advance freight, but only to pay it "if required." The argument for the defendants is that, inasmuch as a deduction is to be made for interest and insurance, the condition must be performed at a time when it is possible to satisfy the alleged object of that deduction. That is certainly an ingenious way of putting the case; but, upon reflection, I am unable to assent to it. What right have I, having regard to the nature of advance freight, and remembering that it is money paid, not for safe carriage, but merely for the undertaking to carry, to read into that clause the words "if required before the loss of the vessel." The provision as to deduction for insurance seems to me to mean nothing more than this: that inasmuch as the owner, who in the ordinary course of things would insure the whole freight, will not want to insure so much

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of that freight as he gets safely into his pocket, he is to make a deduction, when he gets that money into his pocket, of so much as it would have cost him to insure that money. That appears to me to give full effect to the words "less 3 per cent. for interest and insurance"; and, if it does, there is nothing to shew that the requirement must be made at a time when the insurance is still capable of being effected—that is to say, before the loss of the vessel. The case, therefore, really appears to me to be covered by the authorities. It is clear that advance freight is not money which is paid in any respect for the safe carriage, but only for the loading of the goods and the undertaking to carry them, and it is clear that an unqualified obligation to pay advance freight can be insisted upon, although the vessel is lost before it is demanded. So here I think that the claim may be made to pay the advance freight, though the vessel was lost before the requirement, in fact, was made. There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Pritchard & Sons, for Hearfield & Lambert, Hull.*

Solicitors for the defendants: *Maples, Teesdale & Co., for Dodd, Bramwell, & Bell, Newcastle-upon-Tyne.*

J. F. C.

1890
Oct. 30.

MALLINSON, Appellant; CARR, Respondent.

Local Government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Unsound Meat—Possession of Unsound Meat intended for Human Food—Exposure for Sale, whether necessary to constitute Offence.*

By s. 116 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), power is given to any medical officer of health or inspector of nuisances to inspect meat "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man"; and if such meat appears to be unsound or unfit for the food of man, he may seize and carry away the same in order to have it dealt with by a justice. By s. 117 the justice may condemn the meat, if unsound or unfit for the food of man, and order it to be destroyed; "and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found," shall be liable to a penalty:—

Held, that a person having in his possession unsound meat intended for the food of man was liable to be convicted under s. 117, notwithstanding that he had not exposed the meat for sale.

Case stated under the Summary Jurisdiction Acts by two justices of the West Riding of the county of York.

The respondent, a butcher, was summoned before the justices to answer an information preferred by the appellant, who was an inspector of nuisances, charging him with having had in his possession certain meat for the purpose of preparation for sale and intended for the food of man, which meat was then unsound and unfit for the food of man, contrary to the provisions of ss. 116, 117, of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

The following facts were proved at the hearing of the summons:—

On May 6, 1890, the defendant, along with other persons, purchased from one Thomas Kettlewell, of Osgodby, near Selby, miller, a cow for 30s., which a veterinary surgeon had ordered the said Thomas Kettlewell to get killed and dressed; and at the time of sale it was stipulated by Kettlewell that it was not to be offered for human food. The beast was slaughtered and cut up into four quarters the same day, and removed in a cart by the defendant from Kettlewell's premises. On the following day, Wednesday, from information that had come to Kettlewell's knowledge, he went to Selby and saw the defendant, and

demanded the carcase back again, stating that he had heard that it was going to be offered for human food. Defendant then asked Kettlewell if he had given the beast any physic, and on Kettlewell stating that he had not, Carr replied that it was good beef, and that he was going to pickle it and cut it up, and refused to give back the carcase.

The prosecutor was then informed of the matter, and he went and saw the defendant, and told him he wanted to look at a carcase of beef he had. The defendant Carr then unlocked the door of an outhouse, occupied by one Ambrose Chambers, situate in the Grey Horse Inn Yard, Selby, and he there saw in a cart four quarters of beef. He asked the defendant what he was going to do with it, and he said, "Put it into pickle and cut it up."

The prosecutor, thinking the meat was not good for human food, took possession of it, and then called in the medical officer of health, Dr. Wilson, and it was taken before a justice of the peace and condemned as unsound and unfit for the food of man. Dr. Wilson, the medical officer, was called, and proved that he had examined the four pieces of beef, and thought that it was unsound and unfit for the food of man.

The justices refused to convict the respondent, being of opinion that the decision in *Vinter* v. *Hind* (1) applied, and that, inasmuch as the meat was not exposed for sale at the time of the seizure, no offence under s. 117 of the Public Health Act, 1875, had been committed. The question for the opinion of the Court was, whether upon the facts stated in the case the justices had come to a correct decision in point of law.

Lumley Smith, Q.C., for the appellant. The justices took a wholly wrong view of the decision in *Vinter* v. *Hind* (1), which has no application to the point raised here. If their view is correct, the Act would be nugatory as a protection to the public.

Scott Fox, for the respondent. The words of s. 117, "in whose possession or on whose premises the same was found," must mean "at the time of exposure for sale," and knowledge that the meat was unsound is a necessary ingredient in the offence. If not, an

(1) 10 Q. B. D. 63.

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innocent person on whose premises the meat was found—such as the servant or messenger of the owner of the meat—would be liable to conviction, whilst the owner would not. The legislature cannot have intended that result. The intention was to punish persons who knowingly exposed for sale unsound meat intended for the food of man.

Lumley Smith, Q.C., in reply, referred to *White* v. *Redfern*. (1)

HAWKINS, J. I am of opinion that the magistrates, upon the facts before them, came to a wrong conclusion in point of law, and that the case should be remitted to them with this expression of our opinion. [The learned judge stated the facts.] It is clear that there was abundant evidence to justify the magistrates in coming to the conclusion that the meat was unfit for human food. It was not disputed that the respondent intended it to be used for human food, because he told both Kettlewell and the inspector of nuisances that he intended to cut it up and pickle it. Even if knowledge was necessary to constitute the offence, there was abundant evidence that the respondent knew that the meat was unsound and unfit for human food. There was also evidence upon which the magistrates might come to the conclusion that it was on his premises for the purpose of preparation for sale. Sect. 116 of the Public Health Act, 1875, gives power to any medical officer of health or inspector of nuisances to inspect meat "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged," and the medical officer or inspector may seize and carry away any such meat found to be unsound or unfit for the food of man, in order to have the same dealt with by a justice. Then proceedings are taken under s. 117, by which the justice may (if he thinks fit) condemn the meat "so seized" and order it to be destroyed, "and the person to whom the same belongs or did belong, at the time of exposure for sale, or in whose possession or on whose premises the same was found," shall be liable to be fined or

(1) 5 Q. B. D. 15.

imprisoned as specified in the Act. It appears to me that, if it was intended to deal with a man in whose possession unsound meat was found, the legislature could not have used plainer language; and, having regard to the general objects of the Act, I should infer that the legislature did mean exactly what it has said. The words, "or in whose possession or on whose premises the same was found," are applicable to meat which is in course of preparation for food. I can find nothing in s. 117 which says that no man, even although he has unsound meat in his possession which is intended for the food of man, and although he is preparing it for sale with the intention of selling it, can be convicted unless he actually exposes it for sale. I cannot think it can have been intended that, however great a quantity of diseased or unsound meat a man has in his possession for the purpose of selling it, he should be liable to no penalty under the Act. The legislature cannot have intended that construction. I should not have expected to find those words, "or in whose possession, or on whose premises the same was found," in the section at all, if the true construction was that there must be an exposure for sale before there can be a conviction. Dealing only with the question asked by the justices, I am of opinion that exposure for sale is not a necessary ingredient of the offence, and, therefore, the matter ought to be remitted to the justices to deal with as in their discretion they think fit. Our decision does not, of course, enforce upon them any obligation to convict. It was urged in the argument on behalf of the respondent that the legislature could not have intended that a person who was ignorant of the condition of unsound meat found on his premises should be liable to conviction. It is not necessary in the present case to give any decision upon that matter. It is, however, worthy of attention that in statutes creating offences the words "knowingly" and "wilfully" are frequently used, and that no such words are found in this statute.

STEPHEN, J. I am of the same opinion. The justices have misapprehended the judgment of the Court in *Vinter* v. *Hind*. (1) That case was entirely different from the present. It turned

(1) 10 Q. B. D. 63.

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upon a different collocation of words in the statute, requiring a different coincidence of things in order to constitute the offence. In my judgment in *Vinter* v. *Hind* (1) I am reported to have said that there must be a seizure of meat exposed for sale in order to render the person in whose possession it was seized, or whose property it was, liable to the penalty. Probably I did say so; and I think it was right, because that case turned upon those words, "exposed for sale," in s. 116. This case, however, turns upon different words occurring in s. 117. The offence is having in a person's possession, or on his premises, meat which is unsound and unfit for human food. There was unquestionably evidence, in the present case, that the respondent committed that offence. He was in possession of meat which was unsound and unfit for human food, and it is not an element of that offence that the meat should either have been exposed for sale or prepared for sale. Sect. 117 first defines the condition of things which must exist before the meat can be condemned and ordered to be destroyed, and then goes on to say, "the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession, or on whose premises the same was found, shall be liable to a penalty," &c. I cannot agree with the argument that unless there is an exposure for sale no offence is committed. The Act does not say so. It deals with the case of a man having in his possession meat intended for human food and unfit for human food. It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession was unfit for human food, and it was said to be an unreasonable intention to impute to the legislature. I do not think that is the proper way to interpret an Act of Parliament. The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly, without reference to any supposed intention of the legislature which cannot be gathered from the natural and ordinary meaning of the words. The short result is that a person in possession of meat intended for human food and unfit for human food is liable to conviction; and, for my own part, I think he is liable

(1) 10 Q. B. D. 63.

whether he knows or does not know that the meat was unfit for human food. In answer to the question asked by the justices, I say that it is wholly immaterial whether the meat was exposed for sale, or prepared for sale, at the time it was seized.

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Case remitted accordingly.

Solicitors for appellant: *Williamson, Hill & Co., for Bantoft & Son, Selby.*

Solicitors for respondent: *Ridsdale & Son, for J. K. Burton, Selby.*

W. A.

EX PARTE THE LEICESTERSHIRE COUNTY COUNCIL AND THE STANDING JOINT COMMITTEE OF THE COUNTY OF LEICESTER. IN RE THE LOCAL GOVERNMENT ACT, 1888.

Nov. 7, 13.

Local Government—County Council—Justices—Standing Joint Committee—Constitution of Police Districts—Police Act, 1840 (3 & 4 *Vict. c.* 88), *ss.* 3, 27, 28—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 3, *sub-s.* 1; *s.* 9, *sub-s.* 1.

The control over the division of a county into police districts is, under the Local Government Act, 1888, vested in the Standing Joint Committee of the county.

QUESTION submitted to the Court under s. 29 of the Local Government Act, 1888, by the Leicestershire County Council and the Standing Joint Committee of the county of Leicester, to determine to which of these bodies "the powers or duties of assessing and levying police rates, of altering police districts and of requiring an equal police rate to be levied throughout the county instead of a general police rate and local rates in the districts into which the county has hitherto been divided," were transferred under the Act. The question had arisen in consequence of a resolution of the County Council that one uniform police rate should be levied throughout the county. Prior to the coming into operation of the Local Government Act, 1888, it had been divided into police districts, the expenses of which were defrayed by a general rate and local rates, pursuant to the provisions of the Police Act, 1840. (1)

(1) By the Police Act, 1840 (3 & 4 Vict. c. 88), s. 3: "The justices of the county in general or quarter sessions assembled, shall make a fair and equal police rate, and for that purpose shall assess and tax the whole district

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EX PARTE LEICESTERSHIRE COUNTY COUNCIL AND STANDING JOINT COMMITTEE OF COUNTY OF LEICESTER.

IN RE LOCAL GOVERNMENT ACT, 1888.

Buszard, Q.C., and *Macmorran*, for the County Council.
R. S. Wright, for the Standing Joint Committee.

Cur. adv. vult.

for which the constables are appointed rateably and equally, according to a certain pound rate, &c."

By sect. 27: "And whereas the number of constables needed may be different in different parts of the same county, be it enacted that it shall be lawful for the justices of the peace for any county in general or quarter sessions assembled, if they shall be of opinion that a distinction ought to be made in the number of constables appointed to keep the peace in different parts of the county, to divide the county or any part thereof into police districts, consisting of such parishes and places or parts of parishes and places as shall appear to them most convenient, and to declare the number of constables which ought to be appointed for each police district, and from time to time to alter the extent of such police districts; and the number of constables to be appointed for each, and a report of every such proposed division or alteration, and of the number of constables proposed for each police district, with an estimate of its extent and population, and of any circumstances upon which the determination of the justices shall have been grounded, shall be sent to one of Her Majesty's principal Secretaries of State, and, if approved by the Secretary of State, such division or alteration shall be deemed to be completed."

By sect. 28, "If the Secretary of State shall approve of such division of the county or of any part thereof into police districts for the purpose aforesaid, the expense of putting the said Act into execution in such county or part of such county shall be classed under two heads of general expenditure and local expenditure; and the general expenditure shall be defrayed in common by all districts; and the local expenditure, consisting of the expense of the salaries and clothing of the constables appointed for each district, and such other expenses as the justices, subject to the approval of the Secretary of State, shall direct to be included under this head, shall be defrayed by each police district separately, and the police rates shall be assessed and levied in each police district accordingly; provided always that, notwithstanding the division of any county or part of a county into police districts, the constables of all such districts shall continue as part of the same force and be subject to the same authority and be liable, if required, to perform the same duty in any part of the county or elsewhere, as if no such division into police districts had been made."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3: "There shall be transferred to the Council of each County on and after the appointed day, the administrative business of the Justices of the County in quarter sessions assembled, that is to say, all business done by the Quarter Sessions or any Committee appointed by the Quarter Sessions in respect of the several matters following, namely: (sub-s. 1), the making, assessing, and levying of county, police, hundred, and all rates, and the application and expenditure thereof, and the making of orders for the payment of sums payable out of any such rate, or out

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EX PARTE LEICESTERSHIRE COUNTY COUNCIL AND STANDING JOINT COMMITTEE OF COUNTY OF LEICESTER.

IN RE LOCAL GOVERNMENT ACT, 1888.

1890. Nov. 13. HAWKINS, J. The question which the Court has to determine is whether the County Council of Leicestershire or the Standing Joint Committee of Leicestershire has control over the division of the county into police districts. It is a question upon which no authority exists, and which depends on the construction of certain sections of the Police Act, 1840, and of the Local Government Act, 1888.

The 3rd section of the Police Act, 1840, provides that the justices for a county shall make a police rate. The 27th section recites that "the number of constables needed may be different in different parts of the same county," and empowers the justices to divide the county into police districts, and to fix the number of constables necessary for each district, subject to the approval of the Secretary of State. No persons could be more qualified to make the division than the justices with their abundant local knowledge as to population and crime. The object of s. 28 is to produce equality in the rating. Obviously more police are necessary in a populous town like Leicester than in a thinly inhabited rural district of equal extent, and it would be unfair in such a case to make the inhabitants of the rural district pay for the police at Leicester. When the county is not divided into districts under s. 3 only one general rate is to be levied. Under s. 28, when a system of districts is adopted, "the expense is to be classed under two heads of general expenditure, and local expenditure, and the general expenditure shall be defrayed in common by all districts, and the local expenditure, consisting of the salaries and clothing of the constables appointed for each district, &c., shall be defrayed by each district separately." Forty years ago the county of Leicester was divided by the justices pursuant to this Act, and with the approval of the Secretary of State, into eight police districts, and a general police rate and

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of the county stock, or county fund, and the preparation and revision of the basis or standard for the county rate."

By s. 9, sub-s. 1: "The powers, duties, and liabilities of Quarter Sessions, and of Justices out of session, with respect to the county police, shall, on and after the appointed day, vest in and attach to the Quarter Sessions and the County Council jointly, and be exercised and discharged through the Standing Joint Committee of the Quarter Sessions and County Council appointed, as hereinafter mentioned."

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EX PARTE LEICESTERSHIRE COUNTY COUNCIL AND STANDING JOINT COMMITTEE OF COUNTY OF LEICESTER. IN RE LOCAL GOVERNMENT ACT, 1888.

Hawkins, J.

local police rates have been assessed and levied ever since. As the system has lasted for forty years it may be reasonably supposed to have worked well.

The present question turns upon s. 3, sub-s. 1 and s. 9, sub-s. 1 of the Local Government Act, 1888. By s. 3, sub-s. 1, "the making assessment and levying of county police hundred and all rates, and the application and expenditure thereof, &c.," is transferred as part of "the ordinary business and administrative business of the justices" to the county council. There is no allusion in this sub-section to the jurisdiction of the justices with respect to the division of the county into police districts, and I think that if the sub-section had been intended to have the effect of transferring this jurisdiction to the county council the intention would have been indicated. By s. 9, sub-s. 1, "The powers, duties, and liabilities of Quarter Sessions and of Justices out of session with respect to the county police, shall on and after the appointed day vest in and attach to the Quarter Sessions and the County Council jointly, and be exercised and discharged through the Standing Joint Committee of the Quarter Sessions and County Council appointed as hereinafter mentioned." I have given the matter attentive consideration, and I have come to the conclusion that the effect of this section is to give the Standing Joint Committee control over the division of the county into police districts. The payment of the county police is one thing; the distribution of the county police into districts is another. The administrative duty of making and assessing the rates for the maintenance of the police force, and of directing the application and expenditure of them is, in my opinion, vested under the new Act in the County Council, and the control of the division of the county into police districts is vested in the Standing Joint Committee. I think, therefore, that our answer should be to this effect.

STEPHEN, J., concurred.

Judgment accordingly.

Solicitors: *Kingsford, Dorman, & Co., for W. J. Freer, Leicester.*

H. D. W.

[IN THE COURT OF APPEAL.]

1890
Aug. 7;
Nov. 3.

THE QUEEN *v.* SOUTTER.

Metropolis—Metropolis Management Act (18 & 19 *Vict. c.* 120), *s.* 6—*Vestryman, Qualification of—Rating—Occupation—Quo Warranto—Statutory Office.*

In order to be qualified as a vestryman under the Metropolis Management Act, 1855, s. 6, a person must both occupy hereditaments in the parish, and be rated in respect of such occupation upon the rateable value required by the section.

Therefore, where a person occupied and was rated in respect of premises of insufficient rateable value, and also was wrongly rated in respect of other premises of the required value which he did not occupy :—

Held, that he was not qualified to be a vestryman under the Act.

Mogg v. *Clark* (15 Q. B. D. 82) followed.

A quo warranto information will lie in respect of the office of vestryman under the Metropolis Management Act, 1855.

APPLICATION for a quo warranto information against the defendant, calling on him to shew by what authority he claimed to exercise the office of vestryman in the parish of St. Mary Magdalene, Bermondsey.

The facts were as follows: The defendant had been elected to fill the office of vestryman in the above-mentioned parish under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). The ground of the application was that he was not qualified to be a vestryman under s. 6 of the Act. (1) The

(1) The Metropolis Management Act, 1855, s. 6, provides: "The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental [rateable value, see 19 & 20 Vict. c. 112, s. 8] of not less than 40*l.* per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish and be rated or assessed as aforesaid upon such rental as aforesaid within such parish; provided always, that in any parish in which the number of poor-rate assessments at 40*l.* or upwards does not exceed one-sixth of the whole number of such assessments [which was the case in the parish in question] it shall not be necessary, in order to qualify a person to be a vestryman, that the amount of rental upon which he is rated or assessed as aforesaid exceed 25*l.*: provided also that the joint occupation of any such premises as aforesaid, and a joint rating in respect thereof, shall be sufficient to qualify each joint occupier in case the amount of rental on which all such occupiers are jointly rated, when divided by the number of occupiers, gives for each such occupier a sum not less than the amount hereinbefore required."

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defendant occupied a dwelling-house in the parish, in respect of which he was rated on a rateable value of 19*l*. His name also appeared in the rate-book in respect of other premises in the parish occupied by a club, called the Southwark Club and Radical Association, of which the defendant was the secretary. His name and that of another person were entered in the occupiers' column of the rate-book in respect of the club premises, by virtue of an arrangement with the overseers by which they were jointly rated as representing the club in respect of the club premises. The rateable value upon which these premises were assessed was 55*l*.

A rule nisi for a quo warranto information having been obtained on behalf of an unsuccessful candidate at the election,

Aug. 7. *Cluer*, for the defendant, in shewing cause, took the preliminary objection that a quo warranto information would not lie in respect of the office of vestryman under the Metropolis Management Act, 1855. Quo warranto only lies in respect of offices under the Crown or offices created by statute: *Darley* v. *Regina*. (1) The office of select vestryman is not created by the statute, for vestries existed at common law, and the statute does not create a new but only regulates an old office.

Lynden Bell, for the prosecutor. The statute creates the office of select vestryman. A select vestry under the statute has new and different functions and far greater powers than were possessed by vestrymen at common law.

POLLOCK, B. The question is whether this office of vestryman under the Metropolis Management Act is an office created by statute. It seems to me clear that the vestry as it exists under that Act is quite a different body from the old common law vestry. The Act not only provides a mode of election, but creates an entirely new body with powers of a large and varied character. It appears to me that this is an office created by statute, and that quo warranto lies for the usurpation of such an office.

GRANTHAM, J., concurred.

(1) 12 Cl. & F. 520.

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The Court then proceeded to hear the case with regard to the existence of a qualification (1), and being of opinion that the defendant was not qualified, made the rule for a quo warranto information absolute.

The defendant appealed.

Nov. 3. *Cluer*, for the defendant. (2) The terms of s. 6 of the Metropolis Management Act, 1855, were satisfied in this case. The section requires occupation of premises and rating of a certain amount. The defendant occupied a house in the parish; and he was rated upon a rateable value of more than the requisite amount. It is true that such rating was partly in respect of premises not occupied by him, but the terms of the section do not render it essential that he should occupy the premises in respect of which he is rated. If he takes on him the burden of the rate, he is entitled to the corresponding benefit. *R.* v. *St. Pancras* (3) is in point. That case was decided upon 1 & 2 Wm. 4, c. 60, which uses substantially the same words as the Metropolis Management Act, s. 6.

Lynden Bell, for the prosecutor. The manifest intention of the legislature was that the person to be qualified should occupy the premises in respect of which he is rated. *Rex* v. *St. Pancras* (3) was a decision on another statute which uses different language. *Mogg* v. *Clark* (4) is in point.

Cluer, in reply.

LORD ESHER, M.R. I shall decide this case on the assumption that the defendant was in fact rated in respect of the club premises. (5) It is clear that he was not properly rated in the sense that the overseers could not have rated him against his will, and, if they had done so, he could have appealed successfully

(1) It has not been thought necessary to report this part of the case at length, inasmuch as the matter was fully discussed again in the Court of Appeal.

(2) The contention that a quo warranto information would not lie was mentioned, but not pressed in the Court of Appeal.

(3) 1 A. & E. 80.

(4) 15 Q. B. D. 82.

(5) There was some ambiguity in the terms of the entry in the rate-book, and it was suggested during the argument that they did not amount to a rating of the defendant.

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against the rate. But I shall assume that he was in fact rated, so that the same question arises as in *Mogg* v. *Clark*. (1) The question, therefore, is whether the view taken by my brother Lopes in that case was right. A decision upon a former Act of Parliament in pari materiâ, viz., *Rex* v. *St. Pancras* (2), was cited as an authority to the contrary. On looking at the Act now in question, we see that the wording has been altered in several respects from that of the former Act, and, when the alteration of the wording is carefully considered, I think it appears to meet the supposition that a person would be qualified who, like the defendant, was in occupation of some premises, and was also wrongly rated for others which he did not occupy. I think that the words used in this Act shew that the legislature meant to prevent such an anomalous result. In my opinion the proper construction of this enactment is that a person to be qualified must be rated in respect of premises upon the requisite amount of rental, and must be properly rated in respect of such premises, that is to say, he must occupy the premises. The words of the Act are as follows: "The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum, and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish." It seems to me that the first "as aforesaid" was probably inserted to meet such a case as this, and that the meaning of the section is that the person to be qualified must be rated on premises to the requisite amount, and must occupy the premises for which he is so rated. That is the effect of the decision of my brother Lopes, in *Mogg* v. *Clark* (1), which, in my opinion, was right. For these reasons I think the appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. Though the Act of Parliament on which *Rex* v. *St. Pancras* (2) was decided, and the Act which we have to construe are to a great extent similarly

(1) 15 Q. B. D. 82. (2) 1 A. & E. 80.

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worded, yet when I compare the language I find certain small but not unimportant variations. This enactment is really a revision of the old enactment on the subject, as regards the metropolis; and the alteration of the wording appears to me to lead to the conclusion that the legislature intended to alter the law in cases within this Act from that which was laid down in *Rex* v. *St. Pancras*. (1) I agree with the judgment given by my brother Lopes in *Mogg* v. *Clark*. (2)

LOPES, L.J. I had to consider this point in *Mogg* v. *Clark*. (2) That case went to the Court of Appeal. (3) My decision was there affirmed on another ground, so that this point was left open. I considered it carefully on the former occasion, and I have carefully reconsidered it on this, with the result that I am still of the opinion which I then expressed. I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. N. Philcox.*

Solicitor for respondent: *R. H. Ward.*

E. L.

[IN THE COURT OF APPEAL.]

Nov. 4, 5, 17.

THE VESTRY OF ST. MARTIN'S, APPELLANTS; GORDON, RESPONDENT.

Metropolis—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 128—*Refuse of Trade, Manufacture, or Business—Clinkers from Furnaces in Hotel.*

Clinkers produced in the furnaces of boilers belonging to an hotel, used to generate steam for the purpose of supplying power for the electric lighting, and for warming and cooking, and other purposes of the hotel, are not refuse of a trade, manufacture, or business within the meaning of the 128th section of the Metropolis Management Act, 1855, and therefore the scavengers, under s. 125 of the Act, are bound to remove them without payment.

Gay v. *Cadby* (2 C. P. D. 391) discussed.

APPEAL from the decision of a Divisional Court (Lord Coleridge, C.J., and Wills, J.) upon a case stated by a metropolitan police magistrate.

(1) 1 A. & E. 80. (2) 15 Q. B. D. 82.

(3) 16 Q. B. D. 79.

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The facts were as follows. The respondent was the proprietor of the Hôtel Métropole, which was within the appellants' district. A dispute having arisen between the appellants and the respondent on the question whether certain matter was trade refuse, for the removal of which the scavengers under s. 125 of the Metropolis Management Act, 1855, were entitled to be paid by the respondent by virtue of s. 128 of the Act, or matter which they were bound to remove without payment under s. 125, an application was made to the magistrate to determine the question under s. 129 of the Act. The matter, with regard to which the dispute arose, consisted of clinkers produced in the furnaces of certain boilers, situate in the basement of the hotel, and used to generate steam for the following purposes, viz., for supplying power for the electric lighting of the hotel, for the heating of the large public rooms and passages, staircases and halls, and generally of the hotel, for cooking, and occasionally for working the lift and pumping water to the top of the hotel. There were fireplaces and ordinary fires in the ordinary rooms of the hotel. The magistrate held that the said clinkers were not trade refuse within s. 128 of the Act.

The question for the Court was whether the said clinkers were refuse of a trade, manufacture, or business, within the meaning of s. 128 of 18 & 19 Vict. c. 120. (1) The Divisional Court affirmed the decision of the magistrate.

(1) The Metropolis Management Act, 1855 provides as follows, s. 125: "It shall be lawful for every vestry and district board, and they are hereby required, to appoint and employ a sufficient number of persons, or to contract with any company or persons, for . . . collecting and removing all dirt, ashes, rubbish, ice, snow, and filth, and for the cleansing and emptying of privies and cesspools, sewers and drains, in or under houses and places within their parish or district; and such company or persons are hereinafter referred to as scavengers; and such scavengers or their servants shall, on such days and at such hours, and in such manner, as the vestry or district board shall from time to time appoint, sufficiently execute and perform all such works and duties as they respectively are employed or contract to execute or perform; and, if any such company or person fail in any respect properly to execute and perform such works and duties, such company or persons shall for every such offence forfeit a sum not exceeding five pounds."

Sect. 126: "Any occupier of any house or land, or other person, who refuses, or does not permit any soil, dirt, ashes, or filth to be taken away by the scavengers appointed by, or contracting with any vestry or board as aforesaid, or who obstructs the said scavengers in the performance of their

Nov. 4, 5. *R. G. Glenn*, for the appellants. These clinkers are refuse of a trade or business within the meaning of the section. Hotel-keeping is a trade or business. The meaning of the expression "refuse of a trade, manufacture, or business," is not confined to the refuse or residuum of that which is directly the subject-matter of the trade, manufacture, or business, but includes all refuse that is caused by, or is the result of, the carrying on of the trade, manufacture, or business. In *Gay* v. *Cadby* (1) Lindley, J., said: "Refuse of trade includes two classes, viz., residuum of materials worked up in trade or manufacture, and refuse of the material used in order to carry on the manufacture." He also cited *Lyndon* v. *Standbridge*. (2)

J. E. Bankes, (*Crump, Q.C.*, with him), for the respondent. It is clear that matters which the vestry are bound to remove under s. 125 cannot be within s. 128. It cannot be that the owner or occupier is bound to pay for the removal of that which he is bound to allow to be removed. These clinkers are ashes produced by the use of coal for domestic purposes, and therefore they are within s. 125. It is immaterial that they are produced in larger quantity by an hotel than an ordinary dwelling-house. Such an extensive meaning of "trade refuse" as suggested for the appellants leads to absurdity. According to that interpretation of the term, "ashes" produced in a boarding-house would be trade refuse; and, again, if a man worked at his trade on premises other than his dwelling-house, and had a fire for warmth while he worked, that would be "refuse of trade"; whereas, if he worked in the house where he lived, it could not be said that the ashes from his fire were not domestic ashes within s. 125.

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duty, shall for every such offence forfeit and pay a sum not exceeding five pounds."

Sect. 127: "All dirt, dust, night-soil, ashes, and rubbish collected as aforesaid, shall be the property of such vestry or board, and such vestry or board shall have full power to sell and dispose of the same for the purposes of this Act as they shall think proper, &c."

Sect. 128: "In case any scavenger be required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum, in case of dispute, to be settled by two justices."

(1) 2 C. P. D. 301.

(2) 2 H. & N. 45.

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R. G. Glenn, in reply. It is a fallacy to say that, because the refuse of a trade or business is of the same kind as is produced within private houses, therefore, it cannot be trade refuse.

Cur. adv. vult.

1890. Nov. 17. The following judgments were delivered.

LORD ESHER, M.R. The question in this case is, whether the vestry are entitled to be paid for the removal of these clinkers, which are, in truth, ashes, though in a peculiar form, the result of the fire used mainly for the engine which performs work for the purposes of the hotel. I do not wonder that difficulties have been felt with regard to the construction of the sections of the Act relating to this matter, for I think they certainly are not free from obscurity, some of which arises from the fact that different expressions are used in different parts of the Act, when probably the same thing was meant. Sect. 125 requires the vestry or district board to appoint persons, or contract with a company or persons for, among other things, collecting and removing all dirt, ashes, rubbish, ice, snow, and filth within their parish or district. Such company or persons are thereinafter referred to as scavengers; and the section provides that such scavengers or their servants shall, on such days and at such hours, and in such manner, as the vestry or district board shall from time to time appoint, sufficiently execute and perform all such works and duties as they respectively are employed or contract to execute or perform. Therefore, the removal of the matters specified in that section is not optional, but compulsory. Now, it cannot be denied that what the vestry were required to remove in this case were ashes, and, therefore, were within the terms of the section, unless there be some subsequent provision which limits the effect of those terms. We are bound to give full effect to the ordinary meaning of the words, unless we find something in another part of the Act which compels us to limit such meaning. The next section, the 126th, provides that any occupier of any house or land, or other person, who does not permit any "soil, dirt, ashes, or filth" to be taken away by the scavengers, shall be liable to a penalty. It is a strange thing for which I can suggest no explanation, that, whereas one would

have expected to find the same words used in this section as in s. 125, somewhat different words are used, the word "soil" being inserted, and the words "rubbish," "ice," and "snow" being left out. And, again, when one comes to the next section, s. 127, which vests the property in matters collected in the vestry or board, the words differ again somewhat from the words used in either of the two preceding sections, being "all dirt, dust, night-soil, ashes, and rubbish." In neither of those sections, however, is there anything to qualify the meaning of the words contained in s. 125. Then we come to s. 128, which contains the words relied upon as affecting this case. That section provides that "in case any scavenger be required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum, in case of dispute, to be settled by two justices." This enactment only applies in case any scavenger is required by the owner or occupier to remove the matters in question. It is obvious, as it seems to me, that it cannot apply to matters which the vestry are bound to remove, whether required to do so or not. It cannot be that the vestry are to be remunerated in case they are required by the owner or occupier to do that which it is their duty to do without any request. The words seem to me to imply that the matters referred to in this section are matters which the owner or occupier may remove for himself if he pleases. The former sections deal with matters which the vestry are directed by the Act to remove, and which the owner or occupier is bound to allow to be removed by them under a penalty; whereas, under this section, it would appear that the owner or occupier may remove the matters specified for himself, or require the vestry to do it; but, if he adopts the latter course, he must pay a reasonable sum for their removal. I think the section contemplates different matters from those mentioned in s. 125. The expression used is altogether new. It is "refuse of a trade, manufacture, or business." It is not "dirt, ashes, rubbish, &c., caused by any trade, manufacture, or business"; nor is it "any refuse, the result of any trade, manufacture, or

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business." I think that "refuse of a trade, manufacture, or business," is a known business term, and means something different from the things which are contemplated by the preceding sections. What, then, is the meaning of the term? It is not possible, I think, to give an exhaustive definition of "refuse of a trade, manufacture, or business." Let us take first the term "refuse of a manufacture," which is perhaps the easiest to deal with. I think that the term applies to cases where a material or subject-matter is being manufactured into something else, and in the course of the manufacture refuse of such material is produced. Cuttings and scrapings of iron produced in the manufacture of iron, for instance, would be refuse of a manufacture. I will not say that is the only refuse of manufacture there could be. It is impossible to foresee what questions may arise in future cases, or to give an absolutely exhaustive definition. The term "refuse of trade" is not so easy to deal with, but I think one can give an instance by way of illustration of what is not refuse of a trade. Take the case of a large linendraper's and hosier's business, such as Marshall & Snelgrove's. Would any one, using words in their ordinary signification in the English language, say that the ashes from the fires which they keep up in order to warm their rooms for their employés or customers are refuse of a trade? The trade of such a firm is to sell stuffs and articles of wearing apparel, and, if in the course of their business there are cuttings of stuff left, these might be refuse of their trade, but not ashes from the fireplaces in their rooms. Then we have, in addition to the words "trade" and "manufacture," the word "business." Is there any difference between "trade" and "business" for this purpose? I think the word "business" was probably inserted to meet the possible suggestion that there could not be a trade except where articles were bought and sold, and to include businesses which were not concerned with buying and selling, but in which refuse might be produced, that for the purposes of the section ought to stand on the same footing as refuse of a trade. I should say that hotel-keeping was rather a business than a trade. Then can there be refuse of such a business? I daresay there may be, though I do not propose to define what would be such refuse. The question is, whether ashes

produced in a furnace used for the purpose of working a steam-engine to do the work described in the hotel are refuse of a business. I do not think that they are. I think the vestry must remove all the ashes produced in whatever place in the hotel. It seems to me that the sweeping construction of the words contended for by the appellants, viz., that refuse of trade means all refuse which is the result of or caused by the carrying on of a trade would, as has been pointed out, lead to many absurdities. If a small shopkeeper who did not live on the shop premises had a fire there for warmth, the ashes from that fire would be upon that construction refuse of a business, and the vestry would be entitled to be paid for removing them; while, in the case of a house next door, where the ashes produced might be much greater in quantity, the vestry must remove them without payment. For these reasons I do not think that these clinkers are "refuse of a trade, manufacture, or business" within the meaning of s. 128 of the Metropolis Management Act, 1855. With regard to the case of *Gay* v. *Cadby* (1), which was cited to us, I must say that I cannot see how it can be distinguished from the present case; but, after trying to understand how the view expressed in that case by Grove, J., and my brother Lindley can be right, I have come to the conclusion, speaking for myself, that I cannot agree with it.

LINDLEY, L.J. The question in this case is whether the clinkers from the furnaces used in the Hôtel Métropole for the purposes mentioned in the special case are to be removed by the parish scavengers without extra payment beyond what they are paid out of the rates, or whether those scavengers are entitled to extra payment from the hotel-keeper for removing such clinkers.

This question turns on the true construction of ss. 125 to 129 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and on the proper application of those sections to the facts of this case. The special case assumes that the term "clinkers" requires no definition or description and is well known to the Court. I understand by it that hard material which is formed by the combustion of coal or coke as distinguished from the ordinary friable ash which is produced by the combustion of the same

(1) 2 C. P. D. 391.

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materials. Small clinkers are frequently found amongst the ashes of an ordinary fireplace. Closed stoves, such as Arnott's stoves, or their modern varieties, produce larger and more numerous clinkers than ordinary fireplaces; and furnaces produce larger and more numerous clinkers still. All this is common knowledge, but has to be borne in mind. It is also well known that the uses to which clinkers can be put are very limited. Speaking generally, they are unsaleable, and those who produce them are only too glad to get rid of them. They are rubbish.

In the sections of the Metropolis Local Management Act which relate to the removal of matter by scavengers, a distinction is drawn between matter which the scavengers are bound to collect and remove without special payment and matter which they are not bound to remove without such payment in s. 125 and s. 128. Matter of the latter sort is referred to as "the refuse of any trade, manufacture, or business, or of any building materials": see s. 128. Matter of the former sort is referred to as "dirt, ashes, rubbish, ice, snow, and filth": see s. 125. The words "soil," "dust," and "night-soil," also fall within this class: see ss. 126, 127. Penalties are imposed on persons who will not allow matter of this sort to be removed: see s. 126. And such matter, when collected by the scavengers, becomes the property of the vestry or local board appointing them: see s. 127. I say "when collected by the scavengers," for that is, in my opinion, the meaning of "collected as aforesaid" in s. 127.

It is obvious that, with so very rough a classification of matters as the above, questions would probably arise as to the class to which some kinds of stuff would belong; and accordingly it is provided by s. 129 that such questions shall be decided by a magistrate. But now his decision may be reviewed on a case stated by him: see 42 & 43 Vict. c. 49, s. 33. In this case the magistrate has decided that the clinkers in question are not "refuse of any trade, &c.," within s. 128, and his decision has been upheld by the Divisional Court. We are however invited to say that "trade refuse," to use a compendious expression for that which is referred to in s. 128, must include the clinkers in question in this case; and reliance is placed on *Gay* v. *Cubby*. (1)

(1) 2 C. P. D. 391.

In that case, however, the ashes were the produce of the furnace of a saw-mill used exclusively for the manufacturing purposes. The Court there held that "trade refuse" cannot be confined to the waste residue of things manufactured, but can also comprehend the waste residue of substances used in the course of manufacture. This, in my opinion, is quite right. Take the case of metal smelting or roasting. The slag of the smelted or roasted metal and the clinkers from the furnaces employed to smelt or roast the metal may both be trade refuse within the meaning of s. 128. Many other cases of the same sort may be put. I do not think, however, that *Gay* v. *Cadby* (1) compels the Court to say that the clinkers here must be trade refuse within s. 128. The furnaces here are principally used for the same domestic purposes as ordinary grates and stoves, and are not used, as in *Gay* v. *Cadby* (1), exclusively for wholly different purposes. I am not prepared to define trade refuse; but I can see that in many trades and manufactures clinkers might come under that description. I think *Gay* v. *Cadby* (1) was right; but I also think that these clinkers may consistently with that decision be regarded as falling within that kind of stuff which the scavengers must remove without extra payment.

LOPES, L.J. The question in this case is whether certain clinkers are "refuse of any trade, manufacture, or business," within the meaning of s. 128 of the Metropolis Local Management Act, 1855.

The facts are set out in the special case. To determine the question raised it is necessary to consider the scheme of certain sections in the Act, beginning with s. 125, and ending with s. 129 (being the sections relating to scavengers), and the meaning of those sections. The scheme of the sections appears to be twofold: with regard to certain things of no value, and which the owner or occupier of the house would wish to get rid of, as being of no value and inconvenient to retain, to compel the vestry to remove them, subjecting those responsible for the non-removal, whether the vestry or its scavengers, and the occupier of the house, if he obstructs their removal, to a penalty: but in

(1) 2 C. P. D. 391.

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the case of any refuse of a trade, manufacture, or business, there is no such compulsion; there must be a request by the owner or occupier, and a reasonable sum paid for removal, on the ground, I presume, that such refuse may have some commercial value, and on that account the owner or occupier may not desire its removal, and requiring a payment because the removal is rather for his convenience than for any sanitary requirement.

These clinkers are ashes in a vitrified form; they are the unconsumed portions of the coal used for the purpose of producing heat and light in aid of the business carried on in the hotel, but not refuse of the business, and fall within s. 125 just as much as any other ashes. Fire is kept for the purpose of almost every trade, manufacture, and business. If we were to hold these clinkers to be refuse of a trade or business, I cannot see how any ashes produced in aid of any trade, manufacture, or business would be removable without payment; and this would be to limit the meaning of the word "ashes" in s. 125 to an extent which I cannot think was contemplated.

It is difficult to give an exhaustive definition of "refuse of any trade, manufacture, or business"; but the definition I am about to give describes what I think those words mean. It is what is discarded after the rest has been utilized for the purpose of working the trade, manufacture, or business—refuse which is the immediate and direct result of the trade, manufacture, or business; not a kind of refuse which would arise as much if there was no trade, manufacture, or business, and is only increased in quantity by reason of the trade, manufacture, or business. I cannot agree with *Gay* v. *Cadby*. (1) Lindley, L.J., can scarcely be correctly reported in that case. He says: "Whatever be the true meaning of the word 'refuse,' it clearly means something beyond what is meant by the same word in s. 125." The word "refuse" does not occur in s. 125.

Appeal dismissed.

Solicitor for appellants: *Fladgates.*

Solicitors for respondent: *Ingram, Harrison, & Ingram.*

(1) 2 C. P. D. 396.

E. L.

FOSTER, APPELLANT; THE NORTH HENDRE MINING COMPANY, LIMITED, RESPONDENTS. 1890 *Oct.* 30.

Mine—Metalliferous Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 77), *s.* 23, *sub-s.* 10—*Offences*—"*Working Shaft*"—*Guides.*

By s. 23, sub-s. 10, of the Metalliferous Mines Regulation Act, 1872, "Every working shaft in which persons are raised" shall, under certain specified circumstances, be provided with guides, and persons contravening the provisions of the section are made liable to a penalty.

The shaft of a lead mine was completed, and a tunnel driven from the bottom of it for the purpose of arriving at the ore, but no ore had been gotten. The men employed in the mine were drawn up the shaft in a bucket unprovided with guides:—

Held, that the shaft was a "working shaft" within the meaning of s. 23, sub-s. 10, and therefore that the owners of the mine were liable to be convicted of an offence against that section.

CASE stated under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, an inspector of mines, before three justices of the county of Flint, charging that the respondents, being the owners and agent of a lead mine in the same county, on April 5, 1890, committed an offence against s. 23, sub-s. 10, of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77).

Sect. 23 enacts that "the following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies."

By sub-s. 10: "Every working shaft in which persons are raised shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides," &c.

Sect. 23 also provides, "that every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act;" and in case of any such contravention or non-compliance by any person whomsoever being proved in the case of any mine to which the Act applies, "the owner and agent of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his

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power enforcing, the said rules or regulations for the working of the mine to prevent such contravention or non-compliance."

At the hearing of the information the appellant gave evidence that on April 5, 1890, he visited the defendant company's mine, and went down the shaft, which was ninety-seven yards in depth; that at eighty-seven yards in depth there was a driving which extended about ten yards; that the only means of descending and ascending the shaft was a bowk, or large bucket, without guides, and attached to a winding rope worked by an engine; that the appellant descended the shaft in the bowk, and that it was dangerous to use it without guides.

It also appeared that the sinking of the shaft was completed on March 31, 1890. It was not, on April 5, 1890, used for raising ore, the driving having been made for the purpose of arriving at the ore. The shaft was not exempted by the inspector of the district from being provided with guides.

The justices dismissed the information, being of opinion that the shaft was not a "working shaft" within the meaning of sub-s. 10.

The question for the opinion of the Court was, whether the shaft was, upon the evidence given at the hearing, a "working shaft" within the meaning of that section.

R. S. Wright, for the appellant. The shaft in the present case was a "working shaft," within the meaning of s. 23, sub-s. 10, of the Metalliferous Mines Regulation Act, 1872. If the construction adopted by the justices is correct, the Act, which is one intended for the protection of workmen compelled in the course of their work to ascend and descend the shaft of a mine, leaves them wholly without protection until the ore is gotten.

J. E. Bankes, for the respondents. In order to be a "working shaft" within s. 23, sub-s. 10, the shaft must be completed, and in course of being used for the ordinary purposes of a mine in operation. It is not a working shaft until the ore has been arrived at. Some meaning must be given to the word "working." It becomes surplusage if the true construction is that the moment a shaft is being used for any purpose sub-s. 10 applies. Sub-ss. 6 and 9 point out what should be done with respect to protection before

the commencement of the actual working of the mine, and there the term "shaft," and not "working shaft," is used, shewing the distinction intended to be drawn by the legislature. It would be unreasonable to compel the mine-owner to provide, during the sinking of the shaft or the driving of tunnels to get at the ore, all the safeguards which are required when the ore has been found and the mine has become a working mine.

R. S. Wright, in reply. The mine-owner is protected against possible hardship by the statute. The general rules of s. 23 are to be observed only "so far as may be reasonably practicable," and the inspector of the district has a discretion to exempt persons from providing the requisites stated in sub-s. 10.

HAWKINS, J. I am of opinion that we ought to determine this appeal in favour of the appellant. The object of the legislature clearly was to protect workmen engaged in mining operations, and required in carrying on those operations to descend and ascend the shaft by means of which they are carried on. The question turns entirely upon the meaning of the words "working shaft" in s. 23, sub-s. 10, of 35 & 36 Vict. c. 77. [His Lordship read the section.] It was contended on behalf of the respondents that the words "working shaft" are only intended to apply to a shaft which is being used for the purpose of bringing up the minerals after the mine has been completed, and is being worked profitably in the sense that the ore is being got. The appellant, on the other hand, contends that the words "working shaft" mean a shaft which is being used for the purposes of the mine, whether the ore is, or is not, actually being got. Looking at the object of the legislature, it is clear to my mind that a shaft is at any rate a working shaft, in the sense in which this section is intended to apply, the moment the workmen are required to descend the shaft after it has been completed. It is unnecessary in this case to say whether a shaft would be a "working shaft" before that moment. I am of opinion that, whether the workmen are required to descend the shaft for the purpose of getting ore which has been already found, or for the purpose of working in order to arrive at the ore, the mine is a working mine, and the shaft is a working shaft within the

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meaning of s. 23, sub-s. 10. If the true construction of the section is that a shaft does not become a working shaft until the minerals have actually been got, the effect is that workmen may be required—it may be for months during the time that workings are carried on in order to arrive at the minerals—to descend the shaft; and, although they are so occupied for the purpose of making the mine productive, until they actually arrive at the ore they are deprived of the protection of the Act. I cannot arrive at the conclusion to which the respondents invite us. In my view, the legislature meant that if a shaft be sunk, and if men are required to descend it for the purpose of carrying on mining operations, then it is a "working shaft" within the meaning of the Act. If it were intended to limit the meaning of the words "working shaft" by making them apply only to a shaft used when the mine had become productive, it would have been easy to say so. The danger to the men is precisely the same whether the mine has become productive or not. It would be a strange result if they were protected only when the mine became productive, and until then were left wholly without protection.

STEPHEN, J. I am of the same opinion. I think that the whole framework of the Act is directed to the purpose of protecting persons engaged in carrying on mining operations. Why should we introduce a mode of construing s. 23, sub-s. 10, which would deprive workmen of the protection of the Act during the most dangerous part of their employment? The argument for the respondents seeks to put a technical construction upon the words "working shaft." Those words, to my mind, have a plain natural meaning with which I do not feel inclined to interfere. The appeal must be allowed, and the case sent back to the magistrates with this expression of the opinion of the Court.

Case remitted accordingly.

Solicitors for the appellant: *J. E. Cartwright, Chester, and the Solicitor to the Treasury.*

Solicitors for the respondents: *Cunliffes & Davenport, for Churton, Chester.*

W. A.

THE BURNLEY EQUITABLE CO-OPERATIVE AND INDUSTRIAL SOCIETY, LIMITED *v.* CASSON. 1890 *Nov.* 4, 5, 6.

Apprentice—Indenture of Apprenticeship with Corporation—Legality of.

A contract of apprenticeship is not invalid by reason of the fact that the master to whom the apprentice is bound is a corporation.

CASE stated by justices.

A complaint was preferred under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), by the Burnley Equitable Co-operative and Industrial Society, Limited, against John Casson, claiming an order directing him to perform his duties according to the terms of a deed of apprenticeship executed by him. The deed in question, which was dated November 28, 1887, and was made between William Casson (the father of John Casson) of the first part, John Casson of the second part, and the complainant society of the third part, witnessed that John Casson, with the consent of William Casson, bound himself, and William Casson, with the consent of John Casson, bound John Casson to the said society to serve them as an apprentice for the term of seven years, from August 13, 1887, to be instructed and employed in the trade or business of a clogger or seatsman and sole maker; and that William Casson covenanted with the society that the said apprentice should at all times during the term faithfully serve the society as an apprentice, and should not at any time during the term absent himself from the service of his said masters without their consent, and that he, William Casson would, during the term, provide the said apprentice with food, lodging, and wearing apparel; and that in consideration thereof, the society accepted John Casson as an apprentice for the said term, and covenanted that they the said society would, by the best methods they could, instruct the apprentice or cause him to be instructed in the trade or business of a clogger, and would pay to William Casson for the use of the apprentice certain specified wages. The deed was duly executed by William Casson and John Casson the defendant, and sealed with the common seal of the complainants, who are and were a society

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duly registered under the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45). By virtue of s. 11 of that Act, registration of a society under the Act renders it a body corporate. The defendant remained in the employment of the complainants from the date of the execution of the deed until February 25, 1890, when he left their employment, and had since refused to return. The complainants had several branch shops or establishments in different parts of Burnley. The defendant might be called upon to work at different branches, and had to work under the orders of the manager of the particular branch at which he might for the time being be employed; he was liable to have his manager changed from time to time, and had as a fact worked under separate managers.

On the hearing of the complaint, it was contended on behalf of the defendant that an apprentice could not be legally bound to a society or company, on the ground that an apprentice is entitled to the personal care and instruction of some defined person, and further that the complainants, having no statutory power enabling them to take an apprentice, could not enter into a binding contract to do so. The justices were of opinion that the apprenticeship deed was invalid, and dismissed the complaint, subject to a case for the opinion of the Court.

R. S. Wright, (*Loehnis* with him), for the complainants. The question is whether an incorporated company can take an apprentice. There is nothing in principle requiring that the master to whom the apprentice is bound shall personally instruct the apprentice. In *Eaton* v. *Western* (1), where the apprentice was bound to a firm consisting of three persons and their successors, it was not disputed that the deed of apprenticeship was binding; it was never suggested that an unchanged continuity in the master was essential to the relationship of master and apprentice. The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which deals with apprenticeships to the sea service, contemplates that ships may be owned by companies.

Swayly, for the defendant. The contract of apprenticeship is an essentially personal one. In Bacon, Abr. tit. Master and Ser-

(1) 9 Q. B. D. 636.

vant, E., it is said, "The placing out of an apprentice to a particular person, arises from an esteem and a good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and therefore the law has made it such a personal trust or confidence, that the master cannot assign or transfer it over to another." It follows that a corporation cannot take an apprentice; for it would necessarily have to delegate the instruction and care of the apprentice to its agents. The language of s. 142 of the Merchant Shipping Act, 1854, is quite inapplicable to a case of apprenticeship to a company, for that section provides that "the indentures shall be executed by the boy and the person to whom he is bound in the presence . . . of two justices." Further, the complainants being a company incorporated by statute, their powers are limited by the terms of the statute, which does not expressly give them any power of taking apprentices.

Loehnis, in reply.

Cur. adv. vult.

1890. Nov. 6. HAWKINS, J. The question reserved for our consideration in this case is, whether an industrial society, registered under the Industrial and Provident Societies Act, 1876, is qualified to take apprentices, and whether a contract of apprenticeship which has been entered into with them is or is not void. There seems to be no direct authority upon the point, and the question must be determined on principle.

Now, it has not been disputed that apprenticeship indentures have often and often been made with incorporated societies or companies. No doubt the legality of such indentures was never called in question; but when one considers the numbers of such indentures which have been made and acted upon, the very fact that they have never been questioned is a circumstance that one is fairly entitled to take into consideration in dealing with the matter. It is said that a contract of apprenticeship is a personal contract, and that as such it is one into which a corporation is incapable of entering. But I do not agree that it is necessarily a personal contract. In the case of a large firm of traders or

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manufacturers some of the partners may have nothing to do with the practical working of the business in which their capital is invested, and may have no further connection with it beyond drawing their share of the profits; but no one doubts that a boy may be lawfully apprenticed to any member of the firm whether personally engaged in the practical conduct of the business or not. There is nothing dishonest in such a person taking an apprentice; for the obvious intention of the parties is that the apprentice should get his instruction from the persons, whether partners or managers, who have the practical superintendence of the business. Take again the case of an articled clerk of a solicitor: it could never be said that the solicitor binds himself personally to give every particle of the instruction. There may be five or six members of the firm, and the one to whom the clerk is articled may have very little to do with him; the whole of the clerk's instruction may be given to him by some one or more of the other partners or by the managing clerks. It seems to me impossible to maintain that it is essential to the contract of apprenticeship that the master should personally communicate the instruction to the apprentice. In the present case the society carefully limit their obligation to this, that they will "by the best methods they can instruct the said apprentice or cause him to be instructed." And I think that that is what is really intended in every indenture of apprenticeship. I can find no case in which it has ever been even suggested that an apprenticeship indenture such as this would be invalid, simply on the ground that the master to whom the apprentice is bound is a corporation. It would be very absurd if it were so. The business of a trading corporation is usually carried on upon a large scale, and presumably the larger the scale on which the business is carried on the greater the opportunities which the apprentice will have of obtaining the instruction he requires. It would be the height of absurdity to hold that, while the apprenticeship of a lad to an individual who was only able to give him very limited instruction was good, an apprenticeship to a corporation who were able to give him the very best instruction obtainable was invalid.

With regard to the subsidiary point that this is a trading

society incorporated by statute, and that it has no express statutory authority to take apprentices, it is enough to observe that such corporations have power to do all acts which are directly incidental to the business which they are incorporated for the purpose of carrying on, and it seems clear that it is directly incidental to the carrying on of a trade that apprentices should be taken in that trade.

The appeal must be allowed and the case remitted to the magistrates.

STEPHEN, J., concurred.

Appeal allowed. Case remitted to the justices.

Solicitor for complainants: *G. B. Wheeler, for Sutcliffe & Sons, Burnley.*

Solicitors for defendant: *Ridsdale & Son.*

J. F. C.

[IN THE COURT OF APPEAL.]

Oct. 25.

CHATENAY *v.* THE BRAZILIAN SUBMARINE TELEGRAPH COMPANY, LIMITED.

Conflict of Laws—Foreign Power of Attorney—Mode of Arriving at Construction—Translation and Expert Evidence—Intention that Power should be acted on in England—Extent of Authority in Transactions in England.

The plaintiff, a Brazilian subject, executed in Brazil in the Portuguese language a power of attorney to a broker resident in London to buy and sell shares. The broker accordingly sold certain shares of the plaintiff in the defendant company, and they were registered in the names of the purchasers. The plaintiff claimed a rectification of the register, on the ground that the sale was not authorized by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or by English law:—

Held, that the intention of the plaintiff was to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, and that if, according to such evidence, the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law.

APPEAL from a judgment of Day, J., on a preliminary issue.

In the year 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favour of one Broe, a stock-

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broker carrying on business in the City of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before Day, J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.

Finlay, Q.C., and *W. Graham*, (*E. B. Calvert*, with them), in support of the appeal. This is a document executed in Brazil according to Brazilian law, and must be governed by the law of that country. Assuming the document to have been intended to be acted on in a number of different countries, still it can only have one interpretation, and cannot be differently construed in each of the countries in which it is acted on, which would be the result if the learned judge's decision is supported. If the view of the defendants is correct and the document is to be construed according to the law of Brazil, then they are in a position to shew that the authority is perfectly general to buy and sell, so that the plaintiff would be bound by the acts of his agent. If the opposite view is right, he might be bound in one country and not bound in another in transactions exactly similar in character. The decision of this case is not affected by the rule that if a

person in one country gives power to another person to do something in another country he must be taken to have intended that the law of the latter country should apply to the transaction, for here the power to act is perfectly general, and is not confined to any specified country. They cited *Maspons y Hermano* v. *Mildred* (1), and *Jacobs* v. *Crédit Lyonnais* (2).

H. D. Greene, Q.C., and *Alexander Young*, for the plaintiff. This is a case of a contract made in one country to be performed in another, and as to matters to be performed in that country the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of that place: Story's Conflict of Laws, s. 280. This is what the parties contemplate, and no inconvenience can arise. It would be impossible for a third party contracting in England with the agent to determine what is the law of Brazil applicable to the transaction. It is enough for him to see what is the apparent authority given to the agent with respect to a transaction in England, and then to determine what is the law of England applicable to it. The contention of the plaintiff is that if the power of attorney is construed according to English law, it did not authorize the transfer of any shares without a letter of advice from the plaintiff to his agent. This the company would be able to see for themselves, and they acted wrongly in not demanding the production of such an authority.

W. Graham, in reply.

LORD ESHER, M.R. In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The Court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words

(1) 9 Q. B. D. 530. (2) 12 Q. B. D. 589.

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used, and to the surrounding circumstances at the time they were used.

Now, this writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business in Brazil. An English Court has to construe it, and the first thing, therefore, that the English Court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and, if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert. That is the first thing the Court has to do. Then, when the Court has got a correct translation into English, it has to do what it always has to do in the case of any such document—either a contract, or such an authority as this—that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion,

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that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

Now, applying those rules to the present case, the first thing to be done is to get at the true construction of the language used in the authority. When the plaintiff used the Brazilian language in this document he must have used it in the business sense given to it in Brazil. Therefore, that has to be ascertained; and then having got that, the equivalent in the English language must be found. Having got in English the equivalent of the Brazilian words, we have to see what the meaning of the language so used is. If it appears that the contract is to be performed in Brazil wholly—that is to say, that the contract shall be performed according to Brazilian law—that is the construction of it, and that is the meaning of the parties; but if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be

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carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was, "I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France." That is one meaning, though this authority is to be applied in a different way in different places.

If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

Now, that I consider to be a mere expansion of the judgment of Day, J. It is the same judgment, but it is in an expanded form. His judgment, therefore, is not altered, but is held to be a correct judgment, although we express it in an expanded form. It follows that the appeal fails, and must be dismissed.

LINDLEY, L.J. The appeal in this case is from an order made by Day, J., at the trial before him of this preliminary point. The certificate of the officer of the Court runs thus: "I certify that the question whether Brazilian or English law is to govern the construction of the power of attorney directed to be tried by order of the Court on the 26th day of February was tried by the Hon. Mr. Justice Day"; that is the question the learned judge had to try, and he found that English law is to govern the construction of the power of attorney. The defendants appeal from that

decision, and say it is not right. The question is, whether it is right. It appears to me that it is when it is properly understood. The expression "construction," as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.

We have to deal with a power of attorney—a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract. The document is in Portuguese. The Court cannot take judicial notice of the Portuguese language, and it must have recourse to the assistance of those who understand it. Recourse must therefore be had to translators; and if there are technical expressions, whether scientific, legal, or other, recourse must be had to experts, in order to get at the correct translation, and in order to express to an English mind the meaning which is conveyed to a Portuguese mind by the words used. In that sense and to that extent recourse must be had to Portuguese assistance. When we have got that, and when we have got the translation, we see what this document is. It is a power of attorney executed by a person resident in Brazil, and it is a power to buy and sell shares in all countries. That being the nature of the authority, how is it to be dealt with? If he buys and sells shares in England, he must buy and sell shares according to English law, and he must deal with people to whom he must produce an English translation of this document. He and they are to act upon a proper English translation, and not upon the original Portuguese. It appears to me that Day, J., is perfectly correct when properly understood: he does not mean that you are not to have recourse to Portuguese assistance for ascertaining the meaning of the words, but that when you are dealing with what takes place in England—which is a transfer or a sale, or some dealing with shares—recourse must be had to the English law. Therefore we ought to affirm his decision, merely removing the ambiguity, which has given rise to this appeal, by expanding his meaning by the words which

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the Master of the Rolls has used; they should be part of our order, and the appeal be dismissed with costs.

LOPES, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Flux, Son & Co.*

Solicitors for defendants: *Birchams & Co.*

A. M.

Followed. NATIONAL COAL BOARD v. EVANS [1951] 2 K. B. 861

Approved. NATIONAL COAL BOARD v. J. E. EVANS & CO., LTD. [1951] 2 All E.R. 310.

Oct. 21; *Nov.* 3.

STANLEY *v.* POWELL.

Trespass to the Person—Wounding with Gun—Accident—Absence of Negligence—Liability.

A trespass to the person is not actionable if it be neither intentional nor the result of negligence.

The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and accidentally wounded the plaintiff, who was engaged in carrying cartridges and game for the party. The jury found that the defendant was not guilty of any negligence in firing as he did.

Held, that the defendant was not liable.

FURTHER CONSIDERATION before Denman, J.

The facts and arguments sufficiently appear from the judgment.

Kemp, Q.C. (*W. H. C. Payne*, with him), for the plaintiff.

H. Dickens and *T. Willes Chitty*, for the defendant.

The following cases were cited on behalf of the defendant, in addition to those referred to in the judgment: *Davis* v. *Saunders* (1); *Alderson* v. *Waistell* (2); *Smith* v. *London and South-Western Ry. Co.* (3); *Manzoni* v. *Douglas* (4); *Brown* v. *Kendall* (5); *The Nitro-Glycerine Case.* (6) (7)

(1) 2 Chit. 639.

(2) 1 C. & K. 358.

(3) Law Rep. 6 C. P. at p. 22, per Blackburn, J.

(4) 6 Q. B. D. 145.

(5) 60 Mass. 292.

(6) 15 Wallace, 524.

(7) It was suggested on behalf of the defendant that, even if a purely accidental trespass were in general a ground of action, the plaintiff was precluded from maintaining the action in the present case by reason of the fact that he was himself a member of the shooting party, and as such must be treated as having taken upon himself all the risks ordinarily incident to the sport. On this point reference was made to a dictum of Blackburn, J., in *Fletcher* v. *Rylands* (Law Rep. 1 Ex. at pp. 286-287); but the present judgment is not founded on any such consideration.

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Nov. 3. DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.

In the statement of claim the plaintiff alleged that the defendant had *negligently and wrongfully and unskilfully* fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury: 1. Was the plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages.

The undisputed facts were, that on November 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and, striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line, that the shot must have been

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diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases—that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the Court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at 100*l*. I left either party to move the Court for judgment; but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the Court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that, by no amendment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain dicta which, until considered with reference to those cases in which they are uttered, seem to support that contention: but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favourable way in which it is now possible to put the case for the plaintiff is to consider the

action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. 7, 28 A., which is referred to by Grose, J., in the course of the argument in *Leame* v. *Bray* (1), to be mentioned presently, in these words: "There is a case put in the year-book, 21 Hen. 7, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere dictum of *Rede*, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, "Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent." But in that very passage Rede makes observations which shew that he has in his mind cases in which that which would be primâ facie a trespass may be excused. The next case in order of date relied upon for the plaintiff was *Weaver* v. *Ward* (2) decided in 1607. There is no doubt that that case contains dicta which per se would be in favour of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are primâ facie trespasses: "Therefore, no man shall be excused of a trespass . . . . except it may be judged utterly without his fault," shewing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the train-band, and the one, "casualiter, et per infortunium, et contra voluntatem suam" (which must be translated "accidentally and

(1) 3 East, 593. (2) Hob. 134.

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involuntarily") shot the other, an action of trespass would lie, *unless* he could shew that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of *Gibbons* v. *Pepper* (1), decided in 1695, merely decided that a plea shewing that an accident caused by a runaway horse was *inevitable*, was a bad plea in an action of trespass, because, if *inevitable*, that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which shew clearly the ratio decidendi of that case are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found *not guilty*, because in such a case it cannot be said with any colour of reason to be a battery in the rider." The more modern cases of *Wakeman* v. *Robinson* (2), and *Hall* v. *Fearnley* (3), lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of dictum in favour of the plaintiff, and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgment explains *Wakeman* v. *Robinson* (2) thus: "The act of the defendant" (viz., driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "was primâ facie unjustifiable, and required an excuse to be shewn. When the motion in this case was first made, I had in my recollection the case of *Wakeman* v. *Robinson*. (2) It was there agreed that an *involuntary* act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the *omission to plead* the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be

(1) 4 Mod. 404. (2) 1 Bing. 213. (3) 3 Q. B. 919.

supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of *Underwood* v. *Hewson* (1), decided in 1724, was relied on for the plaintiff. The report is very short. "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass—Strange pro defendente." The marginal note in Nolan's edition of 1795, not necessarily Strange's own composition, is this—"Trespass lies for an accidental hurt;" and in that edition there is a reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with *Weaver* v. *Ward* (2), I find he writes as follows. "So (it is no battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the Court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it casualiter, et per infortunium, et contra voluntatem suam; for no man shall be excused of a trespass, unless it be justified entirely without his default: *Weaver* v. *Ward* (2); and, therefore, it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded: *Underwood* v. *Hewson*. (3)" On referring back to *Weaver* v. *Ward* (2), I can find nothing in the report to shew that the Court held, that in order to constitute a defence in the case of a trespass it is necessary to shew that the act was *inevitable*. If *inevitable*, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver* v. *Ward* (2) really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

Day v. *Edwards* (4) merely decides that where a man negligently *drives* a cart against the plaintiff's carriage, the injury being committed by the *immediate* act complained of, the remedy must be trespass and not case.

(1) 1 Str. 596.
(2) 14 Jac. 1, Hob. 134.
(3) T. 10 Geo. 1; per Fortescue and Raymond in Midd., Str. 596.
(4) 5 T. R. 648 (1794).

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But the case upon which most reliance was placed by the plaintiff's counsel was *Leame* v. *Bray*. (1) That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricle, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any *other* respect as to the manner of his driving. It was therefore objected for the defendant, that the injury *having happened from negligence* and not wilfully, the proper remedy was by an action on the case, and not of trespass vi et armis; and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by Lawrence, J., at p. 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to shew that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the Court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of *Holmes* v. *Mather* (2), and

(1) 3 East, 593. (2) Law Rep. 10 Ex. 261.

Bramwell, B., in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, Trespass, I., p. 706, with a marginal reference to *Weaver* v. *Ward*. (1) In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as for instance, in a case of self-defence) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to shew not only that the act complained of was accidental" (by which I understand, 'that the injury was unintentional,') "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence,—there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned,—and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence.

(1) 14 Jac. 1; Hob. 134.

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In other words, I am of opinion that if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant. As to costs, they must follow unless the defendant foregoes his right.

Judgment for the defendant.

Solicitor for plaintiff: *H. Fawsett.*

Solicitors for defendant: *Smith, Stenning, & Croft, agents for Stenning*, Tonbridge.

J. F. C.

Oct. 28.

THE MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER *v.* WILLIAMS.

Defamation—Libel—Corporation charged with Corruption—Imputation of Misconduct of which Corporation incapable—Whether Actionable.

In an action for libel brought by a corporation, the statement of claim complained that the defendant had charged the plaintiffs with corrupt practices. It contained no allegation that the plaintiffs had suffered any special pecuniary damage in consequence of such imputation:—

Held, that, inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action.

POINT of law raised on the pleadings.

In an action of libel brought by the plaintiffs, who were the Municipal Corporation of the City of Manchester, the statement of claim charged that the defendant wrote and published of the plaintiffs the following words:—

"The Gas Scandals.

"To the Editor of the *Examiner and Times.*

"Sir,—Manchester has lately been pitying poor Salford, and has exhibited much cheap sympathy or contempt for that misguided, misgoverned, and much-defrauded royal borough. Let Manchester look at home before it throws mud across the Irwell. Some years ago I felt it my duty to write for one of your contem-

poraries some half-dozen articles dealing with the city council's scandalous and abominable expenditure of about 110,000*l.* upon 'our' Victoria Hotel. That investigation brought some strange occurrences (not yet revealed by me) to my knowledge. I received visits from several gentlemen of high standing amongst us, who confided to me facts that dumbfounded me, and which shewed that the citizens lost large sums of money by the lax way in which the job was managed, and that bribery and corruption prevailed to a regrettable extent. Let me express the hope that the commission which Salford is asking for may be extended so as to include Manchester, and, if it possesses statutory power to send for persons and papers, I will undertake to bring before it witnesses and documents who will (and I deeply deplore it) prove that in the case of two, if not three, departments of our Manchester city council, bribery and corruption have existed, and done their nefarious work.

"Yours, &c., S. Norbury Williams."

The statement of claim further alleged that the defendant meant, and was understood to mean thereby, that bribery and corruption existed in three departments of the Manchester city council, and that the plaintiffs were either parties thereto or culpably ignorant thereof. It did not, however, contain any averment that the plaintiffs had suffered any special pecuniary damage as the result of such defamatory publication.

The defendant in his pleading raised the objection of law that the words complained of were not capable of being construed into a libel against the plaintiffs, that the statement of claim disclosed no cause of action, and that a municipal corporation cannot sue in its corporate capacity in respect of the alleged words in the sense complained of.

C. A. Russell, for the defendant. This is not a libel on the corporation, but on individual officers of the corporation. A corporation can have no personal character to be injured. In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1), where an action was brought by a joint-stock company for an imputation of insolvency, whereby the value of their shares was depreciated, it

(1) 4 H. & N. p. 90.

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was no doubt held that the action was maintainable; but in the course of his judgment Pollock, C.B., said that a corporation "could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may."

Blake Odgers, for the plaintiffs. If a corporation can be guilty of malice by its servants so as to render it liable to be sued for a malicious prosecution, it must equally be capable of being guilty of corruption so as to entitle it to sue for an imputation of corruption. Moreover, the libel here complained of contains charges which can only refer to the corporation as a whole. It speaks of "scandalous and abominable expenditure." But the money is voted by the corporate body, and not by the individual members of it.

DAY, J. This is an action brought by a municipal corporation to recover damages for what is alleged to be a libel on the corporation itself, as distinguished from its individual members or officials. The libel complained of consists of a charge of bribery and corruption. The question is whether such an action will lie. I think it will not.

It is altogether unprecedented, and there is no principle on which it could be founded. The limits of a corporation's right of action for libel are those suggested by Pollock, C.B., in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class. There must, therefore, be judgment for the defendant.

LAWRANCE, J. I am of the same opinion.

Judgment for the defendant.

Solicitors for plaintiffs: *Austin & Austin, for Town Clerk, Manchester.*

Solicitors for defendant: *Pritchard, Englefield, & Co., for Hinde, Milne, & Bury, Manchester.*

J. F. C.

POWELL AND OTHERS *v.* THOMAS AND OTHERS. 1890 *Nov.* 3.

Practice—Appeal from County Court—Notice of Motion, Service of—Service upon London Agent of Country Solicitor—Order LIX., *r* 12.

Semble, that in the case of an appeal from a county court where the solicitor to the respondent carries on business in the country, service of the notice of motion upon the London agent of the solicitor is not sufficient service to satisfy Order LIX., r. 12

APPEAL from an order of the Glamorganshire County Court. It appeared that a notice of motion had not been served within twenty-one days from the date of the order upon the solicitor for the respondents, who carried on business at Swansea. It was alleged, but not admitted, that a notice of motion had been served within this time upon the London agents of the solicitor.

E. Ford, for the respondents.
Ashton Cross, for the appellants.

THE COURT (Hawkins and Stephen, JJ.) dismissed the appeal, and expressed the opinion that in the case of an appeal from a county court, where the solicitor of the respondent carries on business in the country, service of the notice of motion on the solicitor's London agent is not sufficient service to satisfy Order LIX., r. 12.

Appeal dismissed.

Solicitor for appellants: *R. White, for Cox, Swansea.*
Solicitors for respondents: *Thomas & Metcalfe, for Leyson, Swansea.*

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[IN THE COURT OF APPEAL.]

HEWETT *v.* BARR.

Practice—Renewal of Writ—Extension of Time—Statute of Limitations—Order VIII., *r.* 1; *Order* LXIV., *r.* 7.

The rule of practice is not to extend the time for renewing a writ of summons after the expiration of the twelve months from the date of the writ, where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations:—

By KAY, L.J., *semble*, however, there would be a discretion to extend the time in such a case under exceptional circumstances.

Doyle v. *Kaufman* (3 Q. B. D. 7. 340) followed.

APPEAL from an order of the Queen's Bench Division, affirming an order of a judge at chambers refusing an application for the renewal of a writ of summons made more than twelve months from the date of the writ.

It was stated in the plaintiff's affidavits, that every effort had been made to serve the writ, but service had not been effected because the defendant could not be found; that, on the last day of the twelve months from the date of the writ, a clerk to the plaintiff's solicitors, was prepared with the necessary affidavit for the purpose of obtaining a renewal of the writ, but, having to attend to the hearing of another case in the Chancery Division, he was unexpectedly detained in Court till after four o'clock, when it was too late to make the application for renewal of the writ; and that at 10.30 the next morning he made an application for the renewal of the writ to a Master, who refused it on the authority of *Doyle* v. *Kaufman* (1), on the ground that the period of limitation, viz. six years from the accruing of the debt for which the action was brought, had in the meantime expired.

Cooper Willis, Q.C., for the plaintiff. The Court has under Order LXIV., r. 7, a discretion to enlarge the time for renewing the writ given by Order VIII., r. 1, notwithstanding the expiration of the twelve months: *Eyre* v. *Cox* (2); and it is submitted

(1) 3 Q. B. D. 7, 340. (2) 25 W. R. 303.

that, though the general rule of practice may be as laid down in *Doyle* v. *Kaufman* (1), it is not an absolute and inflexible rule.

When, as here, the circumstances are exceptional, it is submitted that the Court will extend the time, though the period of limitation has, in the mean time, expired: *Weldon* v. *Neal*. (2)

LORD ESHER, M.R. It has been laid down, in *Weldon* v. *Neal* (2), as a general rule of conduct, with regard to the granting of amendments, that they ought not to be granted where they would have the effect of altering the existing rights of the parties. This being the rule with regard to amendments of pleadings, the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the Statute of Limitations. I think this appeal must be dismissed.

LOPES, L.J. This is an application for the renewal of a writ after the expiration of the time for renewal, and where the remedy would, in the absence of such renewal, be barred by the Statute of Limitations. I do not think the application can be granted. As authority for that view, I rely on the case of *Doyle* v. *Kaufman*. (1) Cockburn, C.J., there held that the power to enlarge the time given by Order LVII., r. 6, of the then existing rules, could not apply to the renewal of the writ where, by virtue of a statute, the remedy was gone. That case went to the Court of Appeal (3), and the Court intimated that they thought the judgment of the Queen's Bench Division correct, though they dismissed the appeal on other grounds. In my experience, the practice as laid down in that case has been followed ever since.

KAY, L.J. I should be sorry that the Court should hold that it could under no circumstances, after the twelve months from the date of the writ had expired, grant such an application as the present. I confess that, as at present advised, I am disposed to think that Order LXIV., r. 7, might be construed to give the Court power to do so under exceptional circumstances. I can

(1) 3 Q. B. D. 7, 340. (2) 19 Q. B. D. 394.
(3) 3 Q. B. D. 340.

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imagine a case where, it being proved that every kind of effort had been made to serve the writ, and by accident or mistake no application to extend the time having been made within the year, it would be very hard that the plaintiff should lose all remedy because the period of limitation had in the meantime expired. Here, however, no such exceptional facts are shewn. The affidavit merely states generally that every effort was made to serve the writ. Such vague statements produce little effect on my mind. Moreover, no good reason is given why the application was not made within the year. It is clear that it was not intended to be made till the very last moment. I think, therefore, that there was negligence on the part of the plaintiff, and that no exceptional case is made out for granting the renewal of the writ after the expiration of the year, even if there be power to do so.

Appeal dismissed.

Solicitors for the plaintiff: *Latham, Farmer & Co.*

E. L.

Nov. 2.

[IN THE COURT OF APPEAL.]

WILDING *v.* BEAN.

Practice—Substituted Service of Writ—Defendant out of Jurisdiction—Irregularity—Rules of Supreme Court, 1883, *Order* IX., *r.* 2; *Order* X.

Where a writ was issued in the ordinary form for service within the jurisdiction against a person who shortly before the issue of the writ had left England, and had ever since remained out of the jurisdiction, and it did not appear that the defendant had gone out of the jurisdiction to avoid service of the writ:—

Held (following *Fry* v. *Moore* (23 Q. B. D. 395)), that an order for substituted service of such writ could not be made.

APPEAL from an order of the Queen's Bench Division (Pollock, B., and Grantham, J.) setting aside an order for substituted service of the writ in the action.

The facts, so far as material, were as follows:—

On August 14, 1889, the writ was issued against the defendant in the ordinary form for service within the jurisdiction. The action was brought by the plaintiff as the trustee of a bankrupt's estate upon a covenant in a mortgage deed, by which the

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defendant guaranteed the payment to the bankrupt of the interest upon the mortgage debt by the mortgagor. The plaintiff, being unable to discover where the defendant was, could not effect personal service. He therefore in July, 1890, applied for and obtained an order for substituted service upon a gentleman who had been acting as the defendant's solicitor. An application was made on behalf of the defendant to a judge at chambers to set aside the order for substituted service; but he refused to do so. The defendant appealed to the Divisional Court. Upon such appeal it appeared that the defendant had left England on August 6, 1889, eight days before the issue of the writ, and gone to reside abroad, and that she had remained out of the jurisdiction ever since. As will be seen, the Court did not think that upon the facts appearing from the affidavits it was shewn that the defendant had gone out of the jurisdiction to avoid service of the writ. The Divisional Court thought that the case was governed by *Fry* v. *Moore* (1), and set aside the order for substituted service.

Henn Collins, Q.C., and *R. M. Bray*, for the plaintiff. [They cited Rules of Supreme Court, 1883, Order IX., r. 2; Order X.; *Hope* v. *Hope* (2); *Watt* v. *Barnett* (3); *In re Urquhart.* (4)]

Morton Daniel, for the defendant, was stopped by the Court.

LORD ESHER, M.R. In this case the writ was in the general form for service within the jurisdiction. The plaintiff, being unable to effect personal service, applied for and obtained an order for substituted service of the writ. On appeal against that order it appeared that the defendant was abroad at the time when the writ was issued and had remained abroad ever since. The question is whether, that being so, the plaintiff can have an order for substituted service. The general rule of law based upon the comity of nations is that an English writ has no efficacy and cannot be served in a foreign country. It was said, and I think rightly said, in *Fry* v. *Moore* (1) that, where the writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service. As long as the defendant is abroad

(1) 23 Q. B. D. 395.
(2) 19 Beav. 237; 4 De G. M. & G. 328.
(3) 3 Q. B. D. 263.
(4) 24 Q. B. D. 723.

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Lord Esher, M.R.

such a writ as this cannot be served upon her personally. Therefore it cannot be served by substituted service. It has been provided by statute that the English Court may under certain conditions, and with certain formalities, allow the issue of writs for service, or of which notice is to be given, out of the jurisdiction. Where those conditions are fulfilled, and such a writ is issued, there may be service abroad, and, consequently, in that case the rule would not apply that, as there could not be direct service, there could not be substituted service. But the writ in the present case cannot be served abroad personally, and therefore substituted service of it cannot be allowed. Whether another sort of writ for service out of the jurisdiction ought in this case to be issued is a question to be determined at chambers on application for leave to issue such a writ. The case would have been different if the plaintiff could have satisfied the Court that the defendant left the jurisdiction to avoid service of the writ; but I do not think that the plaintiff has succeeded in shewing that to be the case. For these reasons I think that the decision of the Divisional Court was right and should be affirmed.

LINDLEY, L.J. I agree. I think that this case is governed by the decision in *Fry* v. *Moore*. (1)

LOPES, L.J. I am of the same opinion. If the plaintiff could have established the fact that the defendant left England to evade service of the writ, I think the order for substituted service might have been sustained. In the absence of proof of that, I think the case falls within the decision in *Fry* v. *Moore*. (1)

Appeal dismissed.

Solicitor for plaintiff: *G. B. Crook.*
Solicitor for defendant: *R. S. Gregson.*

(1) 23 Q. B. D. 395.

E. L.

[IN THE COURT OF APPEAL.]

1890
Nov. 17.

BELL & CO. *v.* ANTWERP, LONDON AND BRAZIL LINE.

Practice — Service out of Jurisdiction — Contract "which, according to the terms thereof, ought to be performed within the jurisdiction" — Order XI., *r.* 1 (*e*).

By Order XI., r. 1, service out of the jurisdiction of a writ of summons or notice of such writ may be allowed wherever (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.

In order that a case may come within the above provision, the contract must expressly or by implication require that performance should be within the jurisdiction.

Where a foreign company chartered a ship from English shipowners to take a cargo from London to a foreign port, and by the terms of the charterparty it was stipulated that all lighterage should be at charterers' or consignees' risk and expense, the charterers indemnifying the shipowners from all lighterage on cargo at the port of discharge; but no place was specified for payment of moneys that might become payable under such contract of indemnity:—

Held, that such contract was not one which, "according to the terms thereof," ought to be performed within the jurisdiction, within the meaning of Order XI., rule 1 (*e*), and therefore leave to serve notice of the writ out of the jurisdiction in an action upon such contract against the foreign company could not be given.

APPEAL against an order of a Divisional Court (Cave and Day, JJ.), setting aside an order of a judge at chambers, which gave leave to serve notice of the writ of summons in the action out of the jurisdiction.

The plaintiffs, a Newcastle firm, sued as the owners of a British ship called the *Marana*. The defendants were a foreign société anonyme who carried on business at Antwerp, and had no place of business within the jurisdiction. The defendants had, through their agents, Messrs. Howden & Co., chartered the plaintiffs' ship to load a cargo at a loading-berth in the port of London, and proceed therewith to Rio de Janeiro and Santos. It was stipulated by the charterparty that all lighterage should be "at charterers' or consignees' risk and expense, charterers indemnifying owners from any and all lighterage on cargo at ports of

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discharge, bill of lading or any law or custom to the contrary notwithstanding."

The freight, a lump sum of 5850*l.*, was made payable as follows, viz.: "1500*l.*, if required by charterers on unloading and right delivery at port or ports of discharge, so much as may be payable by indorsement on bills of lading to be taken without recourse to the charterers, and the balance in London by the charterers seven days after final departure of vessel from port of loading." Thirty-five running days (Sundays excepted) were allowed the charterers by the charterparty for loading and discharging the cargo, demurrage, if incurred, to be at the rate of 40*l.* per day.

It appeared from the particulars given of the plaintiffs' claim that they claimed to be reimbursed expenses of lighterage paid by them at the ports of discharge, and also in respect of demurrage at such ports. A judge at chambers, on an ex parte application, made an order giving the plaintiffs leave to serve notice of the writ upon the defendants out of the jurisdiction; but the Divisional Court subsequently set aside the order.

Robson (*Aspinall*, with him), for the plaintiffs. The order for service out of the jurisdiction was rightly made. The case falls within Order XI., r. 1 (*e*). The contract by the charterers to indemnify the shipowners against lighterage expenses at the ports of discharge is a contract which, according to its terms, ought to be performed within the jurisdiction. It is contended that, though the charterparty does not expressly state that payments becoming due under the indemnity against lighterage expenses and for demurrage at the ports of discharge are to be made in England, it is reasonable, having regard to the natural course of business and to the surrounding circumstances, to infer that that was the intention. The debtor must come to his creditor and pay him; and here the plaintiffs were in England. In *Robey* v. *Snaefell Mining Co.* (1), where machinery was ordered of a firm in Lincoln to be delivered in the Isle of Man, it was held that it must be taken to be part of the contract that the payment of the price should be in England. In *Reynolds* v.

(1) 20 Q. B. D. 152.

Coleman (1) it was held by the Court of Appeal that Order XI., r. 1 (*e*), does not require that there should be in the contract an express provision that it is to be performed within the jurisdiction, but that it is enough if, from the terms of the contract and the surrounding circumstances, it may be inferred that such is the intention. The contract is to indemnify the shipowners against lighterage expenses, and the shipowners are in England. The debtor must pay his creditor where he may be. The shipowners are not at Rio or Santos.

[LORD ESHER, M.R. They may have agents there.]

There is nothing to shew that they had. The creditor is entitled to be paid at his own place of business. He is not bound to go elsewhere to be paid.

[LORD ESHER, M.R. Would not the shipowners be entitled to demand payment at the port of discharge the moment the expenses had been incurred?]

It cannot have been the intention that the payments should be at Rio or Santos. The settlement of accounts under the charterparty would, in the ordinary course of business, be in England.

[KAY, L.J. Where the charterparty specifies that certain payments are to be made in London, and says nothing as to the place where others are to be made, does not an inference arise that the others are not necessarily to be made in London?]

It was necessary to provide that the balance of freight should be paid in London because that would not be the ordinary course of business. It was not so as to these expenses.

The same considerations apply to the demurrage.

[He also cited *Hassall* v. *Lawrence* (2); *Watson* v. *Dreyfus* (3); *Wancke* v. *Wingren*. (4)]

James Fox, for the defendants. To bring the case within Order XI., r. 1 (*e*), the contract must be one which, "according to the terms thereof," ought to be performed within the jurisdiction. In this case the charterparty expressly provides that some of the moneys payable under it shall be payable in London, and an inference naturally arises that other moneys payable under

(1) 36 Ch. D. 453.
(2) 4 Times L. R. 23.
(3) 4 Times L. R. 148.
(4) 58 L. J. (Q.B.) 519.

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it, as to which no place of payment is specified, are not necessarily to be payable in England. It is submitted, that the true inference from the terms of the contract is that the lighterage expenses and demurrage at the port of discharge were payable there or at Antwerp, or at most that they were payable anywhere. If the latter were the case, that would not be within the terms of the rule.

Robson, in reply.

LORD ESHER, M.R. In this case shipowners in England have brought an action against a foreign company carrying on business in Antwerp, and having no place of business in England, and an order has been made allowing notice of the writ to be served out of the jurisdiction. The question is whether that order was rightly made. It appears from the particulars of claim that the action was on certain stipulations in a charterparty, which was entered into by the defendant company with the plaintiffs, with regard to lighterage and indemnity to the shipowners against expense in respect thereof at the ports of discharge, and with regard to demurrage. It clearly could not be said that the charterparty as a whole was to be performed in England; but these stipulations with regard to lighterage and demurrage form no doubt distinct contracts on which, if broken, the plaintiffs are entitled to sue. I will deal first with the stipulation as to payment of expenses of lighterage at the ports of discharge and indemnity by the charterers in case the shipowners should pay such expenses. The lighterage would have to be paid for at Rio and Santos to the people there who did it. So far as any contract to pay the lighterage is concerned, it must be to pay it there. But it is said that the charterers have contracted to indemnify the shipowners if they pay it. The question therefore arises, where is the payment under that contract of indemnity to be made? The obligation of the charterers to indemnify the shipowners would be complete as soon as they paid the lighterage to the people who did it at the ports of discharge. It seems to me that, so far as the terms of the contract are concerned, the repayment at all events might be there or it might be elsewhere. Where is the contract of indemnity to be per-

formed if no place for its performance is named in the contract? Where there is no place named for payment of a debt, I think the debtor is bound to pay the creditor on demand; though it is true that, where the contract does not make a demand previous to action a condition precedent, the creditor need not demand his debt otherwise than by bringing his action; he may in that case bring his action without previous demand, and say that the debtor owes him the money, and it is the duty of the debtor to come to him and pay the debt. Where a debtor is bound to pay his creditor on demand, the creditor need not demand his debt at the debtor's place of business or dwelling-house, or any particular place, he may demand payment from his debtor wherever he may find him. Wherever he finds the debtor and demands his debt, the debtor is bound to pay him then and there. Payment of the debt has not to be made in any specified place, but may be anywhere. That being so, let us consider the provision of Order XI., r. 1 (*e*). The Court is asked under that provision to give leave to serve notice of the writ abroad upon a foreign company carrying on business out of the jurisdiction. As has often been pointed out, by the general rules of international law an English writ has no efficacy in a foreign country; but the legislature may no doubt provide for service of writs in a foreign country and impose on the Courts of this country the duty of recognising such service as good. Here the rules, which have the force of an Act of Parliament, provide that in certain cases, if certain conditions are fulfilled and subject to certain rules, a notice of a writ of summons may be served upon a foreigner out of the jurisdiction. One case in which this may be done is where "the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." The words are not "which according to the 'course of business' or the 'surrounding circumstances' ought to be performed within the jurisdiction," but "which 'according to the terms thereof' ought to be performed within the jurisdiction." No Court has a right to break from the words and make another rule for itself. Unless the Court can see that by the terms of the contract it is to be performed within the jurisdiction, it is

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not entitled to make the order for service abroad. The judgment of Cotton, L.J., in *Reynolds* v. *Coleman* (1), has been relied on as supporting the plaintiffs' contention with regard to the effect of the rule. I do not think his judgment goes that length. He said there that to hold that there must be an express provision that the contract should be performed within the jurisdiction would be too narrow a construction of the words of the rule, and that the words of the rule meant that you must look at the contract and the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction. It seems to me that what he says merely amounts to saying that the Court must look at the contract, and, construing it according to the ordinary rules of construction with regard to contracts, must see whether upon the terms of the contract, so construed, it appears to be one to be performed within the jurisdiction. If it does not so appear, then the case is not within the rule. How, then, does the case stand with regard to this contract to indemnify the shipowners in respect of lighterage? If the charterers were bound to perform it out of the jurisdiction if required by the shipowners to do so, how can it be said to be a contract which, according to its terms, ought to be performed within the jurisdiction? It seems to me that the case is not within the rule. Where a contract is one which may be performed in or out of the jurisdiction, as the case may be, I do not see how it can be a contract which, according to its terms, ought to be performed within any more than without the jurisdiction. The same considerations appear to me to apply to the contract with regard to the demurrage. The demurrage was for delay at the ports of discharge. It would be payable there if demanded. If demanded at Antwerp, it would be payable there. For these reasons I think that the case cannot be brought within Order XI., r. 1 (*e*), and, therefore, that the order of the Divisional Court was right, and this appeal must be dismissed.

LOPES, L.J. I also think that the appeal should be dismissed. The Master of the Rolls has gone so fully into the matter that I

(1) 36 Ch. D. 464.

will only say a few words with regard to the application of Order XI., r. 1 (*e*) to this case. I think the answer to the contention of the plaintiffs under that rule is that there is nothing in this case to shew where the lighterage or demurrage is to be payable, and I should say that the inference to be drawn rather was that it ought to be paid at the port of discharge abroad. At any rate, there is nothing in the terms of the contract to shew that it was to be paid within the jurisdiction.

KAY, L.J. I will only add a very few words, with regard to the meaning of the sub-section of the rule to which reference has been made. The words of Order XI., r. 1, sub-s. (*e*), are: "The action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." The expression "according to the terms thereof" would, primâ facie, mean according to the written terms; but in *Reynolds* v. *Coleman* (1) Cotton, L.J., pointed out, and I entirely agree with him, that in construing any contract regard must be had not only to the words of it, but also to the surrounding circumstances under which it was made, and it is possible that, though it may not be stated in terms where the contract is to be performed, yet from the words, taken in connection with the surrounding circumstances, as strong an indication may be found as to the place where it is to be performed as if it had been stated in express terms. But in order to bring the case within the rule, the Court must see, either from the express terms of the contract or on the construction of its terms applied to the surrounding circumstances, that it is, "according to the terms thereof," a contract which ought to be performed within the jurisdiction. It is enough to say that in the case of the contracts now in question this is not made out.

Appeal dismissed.

Solicitors for plaintiffs: *Maples, Teesdale & Co., for Lietch, Dodd, Bramwell, & Bell.*

Solicitors for defendants: *Parker, Garrett, & Parker.*

(1) 36 Ch. D. 453.

E. L.

1890
Nov. 4.

HEAP *v.* PEART.

County Court—Costs—Refresher to Counsel—Hearing of Cause after Return Day—Adjournment of Trial for Want of Time—Higher Scale of Costs—Item 78.

Where a cause in a county court, to which the higher scale of costs applies, is not reached on the day fixed for the hearing, and such cause consequently stands in the list for hearing on more days than one, it must be taken to have been "adjourned for want of time," and the judge has jurisdiction under Item 78 of the scale to allow a refresher to counsel of the amount therein specified.

PROHIBITION to county court.

This was an action brought in the Birmingham County Court. It was set down in the cause list for hearing on June 18, 1890; but owing to the hearing of a cause which stood before it on the list having occupied the whole of the 18th and 19th, it was not reached until June 20.

The plaintiff having succeeded in the action, and obtained judgment for a sum of 27*l.* 1*s.* 9*d.*, the judge made an order allowing to the plaintiff's counsel a refresher fee of 1*l.* 3*s.* 6*d.*, on the ground that the trial of the action had been "adjourned for want of time" within the meaning of Item 78 of the higher scale of costs in the county court. The judge, when making such order, in the course of his judgment stated that in his opinion each day's sitting in the county court was a separate sitting. The defendant accordingly moved the High Court for a writ of prohibition to the county court prohibiting it from further proceeding in the matter of the said order.

W. Wills, for the defendant. The judge had no jurisdiction to make the order. His only power of allowing refreshers to counsel is that given by Item 78, which provides that "where the trial lasts more than one whole day, or is adjourned for want of time, further consideration, or upon payment of the costs of the day, a refresher may be allowed by order of the judge not exceeding" the amounts there mentioned. The trial in this case was not "adjourned"—it was simply not reached. "To adjourn" a trial means to postpone it to some date at which it would not

come on in the ordinary course. In common parlance, a cause would never be spoken of as being adjourned merely because it happened to be in the list for several days. Sect. 88 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), provides what shall be done "if upon the return day, or at any continuation or adjournment of the Court, or of the action or matter, the plaintiff shall not appear"—drawing a clear distinction between a *continuation* of the sitting or trial, where the Court sits, as it sat here, de die in diem, and an *adjournment* where the sitting or trial is discontinuous.

Muir Mackenzie, for the plaintiff. The trial was adjourned within the meaning of Item 78. The sittings in county courts are not continuous as they are in the High Court. In the ordinary course the sitting in the county court lasts only for a single day. It is a mere accident that the court at Birmingham sits from day to day. The judge has stated, that in cases in which the Court sits for more days than one the practice of the county courts is to treat each successive day as a separate sitting. In that view of the case, it is only by means of an adjournment that a cause can be heard on any day other than the return day.

Wills, in reply.

HAWKINS, J. In this case I have come to the conclusion that we cannot interfere with the allowance of the refresher fee to counsel. Whether in the exercise of my discretion I should have allowed it, had I been sitting as county court judge, is another question; but I cannot say that it was outside of the jurisdiction of the judge to allow it. The cause was set down in the general list for hearing and not reached till the third day, and the question is whether under those circumstances a refresher was allowable. That depends on the question whether the sittings in the county court were one continuous sitting de die in diem, or a succession of adjourned sittings, each lasting but a single day. The judge stated in his judgment what his view was, namely, that each day was a separate sitting. He was of opinion that the Court was adjourned from day to day. It is not for us to say that the sittings were not separate sittings if the judge, who

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was at liberty to do so, has chosen to treat them as such. But if they were separate sittings, then Item 78 applies. That item provides for two states of things: first, where the trial commences on the first day and lasts into a second day; and, secondly, where the trial is not so commenced on the first day, but stands wholly adjourned. The present case came within the second branch of the item. The motion for prohibition must, therefore, be dismissed.

STEPHEN, J., concurred.

Motion refused.

Solicitor for plaintiff: *Raphael, for Blackham, Birmingham.*

Solicitors for defendant: *Burton & Co., for Johnson, Barclay & Co., Birmingham.*

J. F. C.

Nov. 8.

[CROWN CASE RESERVED.]

THE QUEEN *v.* BOWERMAN.

Criminal Law—Misappropriation by Agent—Acceptance of Bill of Exchange—Bill incomplete at time of delivery to Agent—Security for Payment of Money—24 & 25 *Vict. c.* 96, *s.* 75.

The prosecutors, being desirous of raising money on their acceptances, entered into an agreement in writing with the prisoner, that he should draw bills on them up to a certain amount, and that they should accept the bills; that the prisoner should then endeavour to get the bills discounted; and that, in the event of his succeeding in so doing, he should pay them a certain proportion of the proceeds, or, upon failure to get them discounted within a certain time, should return the bills to them. In pursuance of this agreement the prisoner drew two bills of exchange upon the prosecutors, who accepted them and handed them back to the prisoner. At the time the bills were so handed back to the prisoner the drawer's name had not been inserted; but in other respects they were then complete bills of exchange. The prisoner subsequently completed the bills by the insertion of a drawer's name, and succeeded in getting them discounted, but in breach of his written agreement with the prosecutors converted the whole of the proceeds to his own use:—

Held, that the acceptances at the time of their delivery by the prosecutors to the prisoner were "securities for the payment of money" within the meaning of 24 & 25 Vict. c. 96, s. 75.

CASE stated by the Recorder of London.

The prisoner was tried at the Central Criminal Court for a

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misdemeanour under s. 75 of 24 & 25 Vict. c. 96. The first count of the indictment charged, that he being then a broker and agent, and having been entrusted by A. P. Tebbitt, as such broker and agent, with certain securities for the payment of money, to wit a bill of exchange for payment of 400*l.*, and a bill of exchange for payment of 290*l.* 17*s.* 6*d.*, with a direction in writing to apply such securities for the purpose that the said bills of exchange should be discounted at a moderate rate of interest for the benefit of the said A. P. Tebbitt, did, in violation of good faith and contrary to the terms of the said direction, unlawfully convert to his own use and benefit the said securities for the payment of 400*l.* and 290*l.* 17*s.* 6*d.* respectively.

The second count charged the same offence, but described the securities for the payment of money as acceptances of bills of exchange.

There were also six other counts charging the same offence with variations as to the purpose specified in the direction, and as to the nature and extent of the conversion.

It appeared that the prosecutors, Messrs. Tebbitt Brothers, being in need of additional capital, inserted an advertisement in a newspaper that they required from 10,000*l.* to 15,000*l.* The prisoner, having seen the advertisement, introduced himself to Mr. A. P. Tebbitt, a member of the firm of Tebbitt Brothers, and represented that he was a bill-broker and had large facilities for advancing the capital required. It was subsequently arranged that the prisoner should draw bills on Messrs. Tebbitt Brothers to the extent of 5000*l.*, and endeavour to get them discounted at a moderate rate of interest, and a document was drawn up and signed by Mr. Tebbitt, setting out the terms of the arrangement which was the direction in writing referred to in the indictment and was in the following terms :—

"Mr. F. Bowerman. Dear Sir,—In accordance with our interview with you, we agree to enter into an arrangement with you in connection with bills of exchange by drawing upon us at four months gradually to the amount of 5000*l.*, and endeavour to discount the same at a moderate rate of interest; but in no event is the rate to exceed 7½ per cent. on the 80 per cent. (to be paid to us on the proceeds of the bills), or 2 per cent. over Bank of

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England rate to be charged us, and half stamps as usual. The bills to be kept renewed for a period of three years, and when eventually paid off by us we undertake to provide the 80 per cent. proportion. Yours truly, Tebbitt Brothers.

"P.S.—We have accepted for you five bills to the amount of 400*l.*, 400*l.*, 290*l.* 17*s.* 6*d.*, 395*l.* 16*s.* 8*d.*, 400*l.* Total, 1886*l.* 14*s.* 2*d.* T. Brothers."

In pursuance of this arrangement, the prisoner drew five bills of exchange, addressed to Messrs. Tebbitt Brothers, for the sums above mentioned, including amongst them the two bills referred to in the indictment. He handed them to Messrs. Tebbitt for acceptance, and they accepted them and handed them back to the prisoner, who signed a memorandum that he received the acceptances in pursuance of the arrangement, and also a further memorandum as follows: "In the event of my not discounting the said bills, I agree to return them to you cancelled within three days. F. B."

At the time these bills were handed to the prisoner the drawer's name was left blank; but the bills were in all other respects complete. The prisoner afterwards handed the two bills referred to in the indictment to one Berg, and requested him to discount them. Berg, at the prisoner's request, inserted his own name as drawer, got the bills discounted, and handed the proceeds, less commission, to the prisoner, who in violation of good faith converted the money to his own use.

At the close of the case for the prosecution, the counsel for the prisoner submitted that there was no case to go to the jury on the grounds that—(1.) At the time the documents referred to in the indictment as securities for the payment of money and bills of exchange were entrusted to the prisoner, they did not come within either of those descriptions. (2.) There was no evidence that the acceptances were entrusted to the prisoner as a broker or agent. The Recorder, however, decided to leave the case to the jury, and reserved the points raised. The prisoner was found guilty on each of the said counts. The question for the opinion of the Court was whether upon the facts stated the prisoner could be properly convicted on any of the counts.

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Poland, Q.C., (*Austin Metcalfe*, with him), for the prisoner. The documents, at the time they were handed back to the prisoner being merely inchoate instruments, without a drawer's name on them, were not securities for the payment of money; they were capable of being converted into securities no doubt by the mere act of the prisoner himself; but they were not yet securities at the time they were entrusted to him. In *Rex* v. *Hart* (1), where acceptances were written by the prosecutor upon blank stamped bill forms and handed by him to the prisoner, who filled up the bills and converted the proceeds, it was held that they were not "securities for money" within the corresponding statute, 7 & 8 Geo. 4, c. 29, s. 5. The fact that in that case no sum was specified on the acceptances at the time that the prisoner took them is not sufficient to distinguish it from the present case, for the acceptances there were available for the amounts that the stamps would cover. In *Stoessiger* v. *South Eastern Ry. Co.* (2) a debtor accepted a bill for £11 10*s.*, the amount of his debt, and handed it to the plaintiff, who was the creditor's traveller. The plaintiff placed it in a parcel and delivered it to the defendants for transmission to his master. At the time of such delivery of the parcel to the defendants the drawer's name had not been inserted in the bill. In the course of the transit the bill was abstracted from the parcel. The Court held, that the acceptance was not a bill, order, rule, or security for payment of money, nor writing of value within the meaning of the Carrier's Act. Secondly, the prisoner was not entrusted as a broker or agent. By the terms of the agreement between the parties, 80 per cent. of the proceeds was to go to the prosecutors and 20 per cent. to the prisoner, and on the bill becoming due each was to find the money to meet it in the above proportions. The relationship between the parties was rather that of a partnership than that of an agency.

H. Avory, for the prosecution, was not called on.

DENMAN, J. It has been contended that these acceptances were not securities for the payment of money at the time that the prisoner was intrusted with them. It is said that they were prevented from being such by the absence of the drawer's name.

(1) 6 C. & P. 106.

(2) 3 E. & B. 549.

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Denman, J.

Except for that it is not disputed that at that time they would have been complete bills of exchange. The amounts were specified. They only wanted the drawer's signature. But the arrangement was that the drawer was to be the prisoner himself. He, therefore, had only to fill in his name to make them complete bills. It cannot under those circumstances be said that they were not securities for the payment of the specified amounts at the time they were handed to him. The cases cited by Mr. Poland are distinguishable. In *Rex* v. *Hart* (1) there was good reason for saying that the acceptances were not securities for money, for no sum was mentioned in them. When people talk of a security for money they do not mean a security for any conceivable sum for which, having regard to the stamp, the document may be filled in. In *Stoessiger* v. *South Eastern Ry. Co.* (2) the acceptances were stolen before they reached the hands of the person who was intended to be the drawer, and in whose hands alone they could be available as securities. That is the very ground upon which that decision proceeded.

As to the second point, whether the prisoner was entrusted as a broker or agent, the only question is whether there was reasonable evidence on which the jury could so find. I cannot say there was not. The conviction must be sustained.

POLLOCK, B. Although these documents were only inchoate instruments, and not complete bills of exchange, at the time of the entrusting, still they were documents on the faith of which bankers or other business men would advance money, and consequently they were securities for the payment of money within the meaning of the section. With regard to the second point, the prisoner no doubt had an interest in the documents beyond that of an ordinary broker; but that fact did not deprive him of the character of a broker, or prevent the relationship from being that of principal and agent.

HAWKINS, J. By the terms of the written agreement between the parties the bills were to be drawn by the prisoner himself. In pursuance of that arrangement he filled up the bill forms and

(1) 6 C. & P. 106. (2) 3 E. & B. 549.

procured the prosecutors to write their acceptances across them. On their being returned to the prisoner it was in his power at any moment to convert them into bills, he having the acceptors' authority to fill in the name of the drawer. Nothing remained to be done by the acceptors to render them liable on the bills. From the moment, therefore, of the writing of the acceptances the documents became securities for the payment of money. Suppose a cheque to be drawn payable to order, and handed by the drawer to the payee, it could not possibly be said that the cheque was not a valuable security until the payee had indorsed it.

As to the other question. The negotiations opened by the prisoner introducing himself as a bill-broker. That of itself is some evidence that it was as a bill-broker that he was entrusted with the acceptances. But even apart from that, it is clear to my mind that he was an agent in every sense of the term. Except in that character, he never would have got possession of the documents.

STEPHEN and CHARLES, JJ., concurred.

Conviction affirmed.

Solicitor for the prosecution: *Solicitor to the Treasury.*
Solicitors for the prisoner: *Norris & Son.*

J. F. C.

1890
Oct. 27.

CONYBEARE *v.* THE LONDON SCHOOL BOARD.

Education—School Board—Vacancy of Office of Member—"Punishment with Imprisonment for Crime"—Conviction by Court of Summary Jurisdiction under Criminal Law and Procedure (Ireland) Act, 1887—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *Sched. II., Part I., r.* 14.

A member of an English school board was imprisoned in Ireland by a Court of Summary Jurisdiction under the Criminal Law and Procedure (Ireland) Act, 1887, for "unlawfully taking part in a criminal conspiracy to interfere with the administration of the law" in a proclaimed district in Ireland:—

Held, that the member had been "punished with imprisonment for a crime" within the meaning of rule 14 of Sched. II., Part I., to the Elementary Education Act, 1870, and that his office was in consequence vacant.

SPECIAL CASE stated to raise the question whether or not the plaintiff, a member of the London School Board, ceased to be a member under rule 14 of Part I. of Sched. II. to the Elementary Education Act, 1870 (1), in consequence of imprisonment under the Criminal Law and Procedure (Ireland) Act, 1887. The plaintiff was charged under that Act before a Court of Summary Jurisdiction with having "unlawfully taken part in a criminal conspiracy to interfere with the administration of the law by unlawfully aiding and abetting the frustration and setting at naught of certain writs and warrants for the recovery of the possession of certain lands, houses, &c. . . . and by unlawfully aiding and abetting, furthering and promoting a certain conspiracy known as and called the 'Plan of Campaign'" (2), in the proclaimed district

(1) By rule 14 of Part I. of Sched. II. to the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), "If a member of the school board absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board, or is punished with imprisonment for any crime, or is adjudged bankrupt, or enters into a composition or arrangement with his creditors, such person shall cease to be a member of the school board, and his office shall thereupon be vacant."

(2) By the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20), s. 2, "Any person who shall commit any of the following offences in a proclaimed district may be prosecuted before a Court of Summary Jurisdiction under this Act."

Sub-s. 1: "Any person who shall take part in any criminal conspiracy now punishable by law to compel or induce any person or persons either not to fulfil his or their legal obligations, or not to let, hire, use, or occupy any land, or not to deal with, work for, or hire any person or persons in the ordinary course of trade, business, or occupation, or to interfere with the administration of the law."

of Falcarragh, in the county of Donegal. He was convicted and sentenced to three months' imprisonment without hard labour, and the conviction and sentence were confirmed on appeal. The action was for a mandamus to compel the defendants to admit the plaintiff to take part in the proceedings of the board, from which he had been excluded on the ground of the imprisonment.

Asquith, Q.C. (with him *W. B. Allen*), for the plaintiff. The plaintiff is not disqualified. The Education Act, 1870, does not extend to Ireland. The expression "any crime" in a disqualifying rule in a schedule to an exclusively English statute should be construed as limited to offences against the law of England. The conviction of the plaintiff took place in Ireland, and was for an offence for which he could not have been tried in any but an Irish Court. It could scarcely be contended that the rule would apply to the case of the imprisonment of a member of a school board in a foreign country.

Jeune, Q.C. (*A. J. Ram*, with him), for the defendants. The plaintiff is disqualified. The object of the rule is to secure that the school boards shall consist of persons of good character and position. The words "is punished with imprisonment for any crime" appear to have been carefully selected. They exclude on the one hand imprisonment inflicted in civil process, on the other hand a fine inflicted in criminal process. If the plaintiff had been imprisoned in England for conspiracy, the rule would manifestly have applied. What difference can it make that the conviction for conspiracy took place in Ireland? Imprisonment for forgery in Scotland or Ireland would clearly be within the meaning of the rule. [He referred to *Ex parte Alice Woodhall.* (1)]

Asquith, Q.C., in reply.

DAY, J. I can come to no other conclusion than that the plaintiff has been imprisoned for a crime, and that his office on the school board is therefore vacant. Conspiracy is a crime in Ireland as in England. It is an offence against the Crown for

(1) 20 Q. B. D. 832.

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which an indictment lies at common law. The circumstance that the Crown did not proceed against the plaintiff for conspiracy by indictment, but preferred the charge upon which he was convicted before a Court of Summary Jurisdiction in Ireland, cannot alter the nature of the charge. The defendants are, therefore, entitled to judgment.

Judgment for defendants.

LAWRANCE, J., concurred.

Solicitors for plaintiff: *Hores & Pattisson.*
Solicitors for defendants: *Gedge, Kirby, & Millett.*

H. D. W.

Oct. 29, 30; *Nov.* 14.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

THE LIVERPOOL CORN TRADE ASSOCIATION, LIMITED *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway and Canal Commission— Undue Preference—Effect of Competition— "Necessity of lower charge for securing in the interests of the public the traffic in respect of which it is made"—Railway and Canal Traffic Act, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act,* 1888 (51 *&* 52 *Vict. c.* 25), *ss.* 7, 27.

By the Railway and Canal Traffic Act, 1888, s. 27, sub-s. 1: "Whenever it is shewn that any railway company charge one trader or class of traders or the traders in any district lower tolls rates or charges for the same or similar merchandise, or lower tolls rates or charges for the same or similar services, than they charge to other traders or classes of traders or the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the company." By sub-s. 2: "In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the Court or the Commissioners sanction any difference in the tolls rates or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services."

On a complaint by an association of traders in grain and flour at Liverpool against the London and North Western Railway Company for undue preference

in respect of the lower rates charged by them for the carriage of these goods from Cardiff to Birmingham as compared with those charged for the carriage of them from Liverpool to Birmingham, a shorter distance, it appeared that the trade of the applicants had suffered through the competition in the Birmingham market of grain and flour from the Bristol Channel and Severn ports, but that only a very small quantity was carried by the respondents from Cardiff to Birmingham. Two other railways competed with the respondents between Cardiff and Birmingham, and the lower rates complained of had been fixed with a view to competition by the respondents with the rates charged by other railways from ports in the Severn to which grain and flour were brought by sea, and which were nearer to Birmingham than Cardiff:—

Held, that the facts shewed an undue preference by the respondents.

Semble, that the effect of s. 27 of the Railway and Canal Traffic Act, 1888, is not to limit the Court in dealing with questions of alleged undue preference to the consideration whether or not the lower charge is necessary in the interests of the public.

APPLICATION by the Liverpool Corn Trade Association, Limited, an association of traders in grain and flour at Liverpool, which had received a certificate from the Board of Trade under s. 7 of the Railway and Canal Traffic Act, 1888, complaining of an undue preference alleged to be shewn by the respondents, the London and North Western Railway Company, in respect of the lower rates charged by them for the carriage of grain and flour from Cardiff to Birmingham as compared with those charged by them for the carriage of the same merchandise from Liverpool to Birmingham.

The following was part of the answer of the respondents: "The Liverpool traders are not subject to any undue or unreasonable prejudice or disadvantage, nor are the Cardiff traders unduly preferred. The rates from Liverpool are fair and reasonable rates. The rates from Cardiff are governed by the rates from Bristol and the Severn ports by the Severn, the navigation of which is free. If they were materially raised, the traffic either would not be sent at all, or would be carried viâ the Severn. The lower charge is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and the inequality cannot be removed without unduly reducing the rate charged from Liverpool." It appeared that the distance for which the goods were carried by the respondents between Liverpool and Birmingham was 89 miles to be charged for by statute as 98 miles, that between Cardiff and

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Birmingham 173 miles, to be treated as between the respondents and the Great Western Railway, over whose line the respondents ran, as 127 miles, and that the charges of the respondents for the carriage of grain and flour between Liverpool and Birmingham were 12*s.* 9*d.* per ton for two ton lots, and 11*s.* 3*d.* per ton for four ton lots; between Cardiff and Birmingham 8*s.* 4*d.* per ton for two ton lots.

On behalf of the applicants, several witnesses engaged in the trade between Liverpool and Birmingham stated that their businesses had of late years declined, and attributed the falling off to the competition from South Wales and the Severn ports. They stated that the higher rates charged between Liverpool and Birmingham would enable traders at Cardiff to charge 3*d.* or 4*d.* a sack less, and so to undersell them.

On behalf of the respondents, it was proved that the amount of grain and flour carried by them from Cardiff to Birmingham in the year ending in June, 1890, was only 330 tons, whereas in 1886 it had been 950 tons; that they and the Shropshire Union Canal Company together carried from Liverpool to Birmingham in 1886, 13,805 tons; in 1887, 19,047 tons; in 1888, 15,430 tons; and in the year ending in June, 1890, 26,689 tons; and that two other companies, the Great Western and the Midland, carried from Cardiff to Birmingham at the same rates. Their general manager stated that these rates were fixed in proportion to the railway rates charged from Gloucester and from the Bristol ports to Birmingham, that these rates made it impossible for them to charge more between Cardiff and Birmingham, and that in his opinion the charges from Liverpool to Birmingham were a fair "port" rate, as compared with the charges of the respondents for the carriage of the same class of goods to Birmingham from other ports, such as London, Hull, Fleetwood, and Barrow. It was not disputed by the counsel for the respondents that the charges from Liverpool to Birmingham were highly remunerative.

Sir R. E. Webster, A.G. (with him *Balfour Browne, Q.C.*, and *W. A. Hunter*), for the applicants, in opening the case.

Under sub-s. 1 of s. 27 of the Railway and Canal Traffic Act,

1888 (1), the burden of proof that the inequality of treatment does not amount to an undue preference is on the respondents. Under sub-s. 2 the Court, in deciding whether a proved inequality does or does not amount to an undue preference, may take into consideration among other matters "whether the difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant." It will be found that the lowness of the rates charged from Bristol is due to competition, and to the determination of the respondents in their own interests, not "in the interests of the public" to secure a share in the traffic from the Bristol Channel to Birmingham. It will be impossible for them to contend that the rates from Liverpool to Birmingham cannot be reduced without ceasing to be remunerative.

Pope, Q.C., and *R. S. Wright*, for the respondents, after the evidence had been taken. The applicants are not entitled to an order. The conveyance of so insignificant a quantity of grain and flour as 300 tons from Cardiff to Birmingham cannot affect the trade from Liverpool to Birmingham. This consideration is

(1) By the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 55), s. 27, sub-s. 1: "Whenever it is shewn that any railway company charge one trader or class of traders, or the traders in any district lower tolls rates or charges for the same or similar merchandise, or lower tolls rates or charges for the same or similar services, than they charge to other traders, or class of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company."

Sub-s. 2: "In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the Court, or the Commissioners sanction any difference in the tolls rates or charges made for, or any difference in the treatment of home and foreign merchandise, in respect of the same or similar services."

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of itself sufficient to dispose of the complaint under sub-s. 1 of s. 27. The effect of sub-s. 2, is, it is submitted, to invest the Court with an extended discretion as to the considerations which they may regard as sufficient justification to railway companies charged with giving undue preference. There are dicta in the decisions on the Railway and Canal Traffic Act, 1854, which recognize the right of railway companies to protect their own interests in cases where there is competition. Under the sub-section these differential rates, having been imposed by the respondents bonâ fide, and with not more than a proper regard to the interests of their undertaking cannot under all the circumstances be regarded as unfair. It is for the public advantage that there should be communication between Cardiff and Birmingham by several lines of railway. [They referred to *Skinningrove Iron Co.* v. *North Eastern Ry. Co.* (1); *Budd's Case* (2); *Evershed* v. *London and North Western Ry. Co.* (3); *Harris's Case* (4); *Ransome's Case* (5); *Jones's Case.* (6)]

Sir R. Webster, A.G., in reply. There is no decision which shews that prior to the Act of 1888, this case could have been decided in favour of the respondents. The suggested construction of sub-s. 2 of s. 27, does not give any adequate effect to the words "in the interests of the public." It is submitted that these words are in the nature of a direction to the Court to make the interests of the public as opposed to those of the railway companies the criterion of the legality or otherwise of differential rates, and that the respondents have failed to shew that the preference in question is necessary "in the interests of the public." [He referred to *Great Western Ry. Co.* v. *Sutton* (7), and *Richardson* v. *Midland Ry. Co.* (8)]

Cur. adv. vult.

1890. Nov. 14. WILLS, J. This is a complaint that the traders in corn and flour and the like goods at Cardiff, are by the respondents unduly preferred as against the traders at Liverpool

(1) 5 R. & C. T. Cases, 244.
(2) 4 R. & C. T. Cases, 393; 36 L. T. (N.S.) 802.
(3) 2 Q. B. D. 254.
(4) 3 C. B. (N.S.) 693.
(5) 4 C. B. (N.S.) 135.
(6) 3 C. B. (N.S.) 718.
(7) Law Rep. 4 H. L. 226.
(8) 4 R. & C. T. Cases, 1.

represented by the applicants, by reason of the rates charged by the respondents for goods of the kind in question carried by them between Liverpool and Birmingham on the one hand, and Cardiff and Birmingham on the other hand. The facts are happily either undisputed or, beyond the range of serious controversy. From Liverpool to Birmingham is a distance of about 89 miles; but under an Act of Parliament the railway company in consideration of the great expense of the construction of Runcorn Bridge are authorized to charge as for a distance of about 98 miles. From Cardiff to Birmingham the railway company carry the goods in question an actual distance of 173 miles, though under an Act of Parliament, as between themselves and the Great Western Railway Company over whose line they pass between Cardiff and Birmingham, they have to treat the traffic as if carried by a shorter route by which it would travel a distance of 127 miles. It is not worth while discussing any question arising in respect of these two figures, or to go into any details as to the rates. It is enough for the purposes of this case to say that they carry the traffic from Cardiff to Birmingham along a very much greater distance than that travelled over by the traffic carried from Liverpool to Birmingham, and at very much lower rates—rates of which 8*s.* 4*d.* per ton as against 11*s.* 3*d.* per ton may be taken as an illustration.

Mr. Pope did not contend that this was not primâ facie an undue preference of the Cardiff traffic, and he admitted that even if the Liverpool rates were lowered considerably they could not be said to be in danger of being *unduly* lowered inasmuch as a substantial and reasonable margin of profit would be left. But he made two points, first, that there was no substantial loss shewn to the Liverpool traders by reason of the Cardiff competition, and that this Court ought not to interfere unless a real grievance were shewn; secondly, that the preference was justified by the fact that between the Severn ports and Birmingham water carriage competes, and the lower rates are necessary to secure the traffic. It will be necessary to examine both of these propositions in detail; the more so as each turns mainly upon the legal principles to be applied, and each raises some very important questions as to the construction of the Act of 1888.

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The applicants are not a corporate body and could not have appeared in their quasi-corporate capacity in this any more than they could or can in any other court, but for the provisions of s. 7 of the Act of 1888. By that enactment they are styled an "authority," and it is provided that upon obtaining the certificate of the Board of Trade, that they are in the opinion of the Board of Trade a proper body to make a specific complaint, such an association of traders may make to this court any complaint which the Court has jurisdiction to determine. It is further provided that they may do so without proof that they are aggrieved by the matters complained of. The necessity of obtaining the certificate of the Board of Trade is a protection to the companies against frivolous or unreasonable attacks upon them by the chambers of commerce and associations of traders. I do not think, however, that the provision requires the Court necessarily to redress fanciful or merely theoretical inequalities of charge or preferences of any other description. Matters of this kind very often assume a very different aspect when the facts are threshed out to that which they may have worn in an ex parte application or statement. Nothing in the enactment as it seems to me, cripples the judicial discretion of the Court in dealing with such a complaint; and I think that if, upon such an application as this, it was established that the matters complained of were such as could not affect the interests of the applicants, or the trade which they represented, it would be quite within the competence of the Court to say that it existed for practical purposes and for the enforcement of rights in matters with which persons applying to the Court have some substantial concern, and to refuse to give judgment upon an academic discussion, presumably under such circumstances with very imperfect information.

But under the provisions of s. 7 the objection that what is complained of does not hurt the applicants, must be dealt with somewhat strictly; and it is enough, I think, to warrant the application and to call upon the Court for its interference, if the practices complained of, whether their present effect be serious or trivial, are in themselves legally objectionable, and if they *may* lead to consequences injurious to the interests of those repre-

sented by the applicants. In the present instance, I am satisfied that the traffic in grain, &c., from Cardiff to Birmingham taken by itself is not large enough to make any appreciable difference to the Liverpool traders, and further, that a far more serious element in the competition from which they suffer is traffic from the Severn ports. Such traffic is partly by water, and the applicants cannot touch the rates applicable to it; partly by railway, under rates as to which no suggestion has been made that they are improper or afford grounds of complaint against any of the companies. But no one can say to what extent a traffic by railway from Cardiff fostered by the two rates complained of may not grow in time, and it is far better for the respondents themselves as well as for all others concerned, that the comparative rates for the Liverpool and for the Cardiff traffic to Birmingham should be properly adjusted now than at some future time when perhaps great industries might have been established at Cardiff on the faith of existing rates; and I cannot help thinking that if such a state of things had been permitted to grow up under the eyes of the Liverpool traders without effectual remonstrance on their part, that fact might have been very properly relied upon as at least one reason for refusing an application of this kind. "Obsta principiis" is a maxim which here, in my opinion, may be justly applied, and I therefore think it is no answer to the application to say that the Cardiff traffic to Birmingham in grain, &c., is very small. That of the respondents undoubtedly is so, and so is that of the Great Western. What is the amount of the Midland traffic between the same points we do not know—why, it is difficult to understand, unless there was a suspicion that perhaps the case might look more serious upon the Midland figures than it does upon those of the respondents and the Great Western.

These considerations render it quite unnecessary to enter into any detailed or minute consideration of the evidence as to the amount of traffic by either route, or to consider the weight of the evidence that the Cardiff rates beat the Liverpool corn merchants out of the field at Birmingham. I do not affect to conceal my incredulity upon this point. The Birmingham trade is a very large one—one of the Liverpool witnesses said that he had in

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former years sold as many as 20,000 quarters or 2000 tons a day in the Birmingham market. The Cardiff traffic by the line of the respondents and by the Great Western railway in grain, flour, and the like, hardly amount in the year to a single cargo of a large steamer. Assertions on the Birmingham market that the Cardiff rates are beating the Liverpool traders out of the field must not be too readily accepted. They are very easily made—and not very easy to answer; and they are very often made by a merchant who does not wish to do business with any great amount of consideration or accuracy. If for "Cardiff rates" be substituted "Severn port rates," I think all the allegations of this nature would probably be perfectly accurate; but for the reasons already given, I think any minute criticism of the figures presented to us of the amount or subdivision of the traffic by either route useless. There is no doubt a very important traffic from Liverpool to Birmingham in the articles under consideration. There is no doubt that it can hardly hold its own in the market. There is no doubt that there is a formidable competition from all the Severn ports, aided by a great many low rates over which no court has any jurisdiction. But there is no doubt, also, that the respondents carry from both Liverpool and Cardiff to Birmingham, and that the legislature has said to railway and canal companies: "If you do enjoy the advantage of serving two places, however far apart, *you* must not sacrifice the one set of local interests to the other by undue inequalities in the rates, and, so far as your contribution to the circumstances under which trades in competing districts are to be carried on is concerned, you must be fairly neutral between them, or if you are not, you must justify the preference upon grounds legally valid." There is no doubt that in this case the rates are unequal to an extent for which—as a question of amount merely—little or nothing could be said if the Cardiff traffic bore any considerable proportion to the Liverpool traffic. Under these circumstances the Liverpool traders are, I think, entitled to be freed from whatever element of unfair competition this court can restrain, be it small or be it large, either in itself or in comparison with other matters from which no court can relieve them; and, seeing how fast important industries may grow up under

favouring rates, and what apparently trifling circumstances may rapidly develop a traffic of this kind, I think it is well, in the interests of all persons concerned, that the preference now complained of should be stopped before any serious damage is likely to be done to any one by interfering with it.

The respondents, however, have a second string to their bow, and contend that the rates in question have been fixed by the necessity of competing with the other means of communication, by which grain, flour, &c., find their way, not so much through Cardiff, as through the other Bristol Channel and Severn ports to Birmingham, and that this circumstance justifies the low rate from Cardiff. I think they have made out their case in point of fact, and that, if the result of this application should be that they prefer to redress the inequalities by raising the Cardiff rates, instead of lowering the Liverpool rates, they will probably lose the Cardiff grain and flour traffic, for whatever it may be worth. But it is a very different question whether this state of things justifies the abnormally low rates from Cardiff, and a careful consideration of s. 27 of the Act of 1888, now to receive for the first time a judicial construction, is necessary.

Allegations of undue treatment of one locality with respect to another have formed the subject of complaint before the late Commissioners, but always at the instance of some private individual or corporate body whose interests were directly affected. Much greater importance has been given to this class of complaints, and they assume a new aspect, by reason of s. 7 of the Act of 1888, which enables such bodies as the present applicants to apply for redress in this matter. Probably nothing has been alleged against railway companies which has been more bitterly resented by the trading community than the differential treatment of two different districts by railway companies serving both localities; and it was natural that enlarged facilities for making such complaints should have been given, and (whether or not jurisdiction in respect of the subject-matter of such preferences has been extended) that any hesitation in dealing with them should have been removed, on the one hand; and that, on the other hand, an attempt should have been made to do something in the way of defining the principles upon which some at least of

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the very important questions likely to arise should be dealt with and decided. This seems to me to have been done by s. 27 of the Act of 1888, though with a faltering hand, and with a disposition to cast upon this Court the responsibility of deciding many things which would have been more naturally, and in a sense more properly, laid down by legislation.

The 1st sub-section of s. 27 makes it clear that all the specific things therein mentioned are within the cognizance and jurisdiction of the Court. It also facilitates the course of a complainant by making it perfectly clear that the various classes of differential treatment enumerated are primâ facie objectionable, and will be restrained, unless they can be justified. Sub-s. 2 proceeds with a direction to the Court that, in addition to any other considerations affecting the case, they may, so far as they think reasonable, take into consideration two things: first, whether the lower charge or difference in treatment complained of is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made; and secondly, whether the inequality cannot be removed without unduly reducing the rates charged to the complainant. It is obvious that this guarded language gives a very free hand to the Court in dealing with questions such as that now before us. We are not bound to take the specified matters into consideration, but we may do so; even then, however, we are to take them into consideration only so far as we may think reasonable; and the use of the words "in addition to any other considerations affecting the case" would naturally be construed as indicating rather an invitation to enlarge than to contract the area of discussion.

I should be very slow, therefore, to adopt the view contended for by the Attorney-General, that henceforward the commercial interests and necessities of the railway companies in fixing charges are to be absolutely disregarded if they conflict with the public interest; and I do not think it necessary or desirable to lay down any such proposition. Such a view is, to my mind, in direct conflict with the wording of the section, under which it is clear that if we thought it was unreasonable under the circumstances of any particular case to take into consideration the questions of public interest, and of a possible reduction of the

higher of the two rates, we should be at liberty to disregard them. But it is equally clear, I think, that the sub-section amounts at least to a very definite suggestion on the part of the legislature that we should entertain in each case the question whether these two matters ought not to be elements in determining whether a case of undue preference is established. There is something to my mind very suggestive in the juxtaposition of these two subjects. The two members of the sentence are coupled by *and*, not by *or*. What are the circumstances under which it would be natural, after taking other legitimate considerations into account, to ask oneself—first, Does the public interest require the maintenance of the lower charge; and secondly, Can the higher charges be reduced without an unfair interference with the interests of the company? Obviously, if upon other grounds, the Court sees that there is no undue preference, these questions become immaterial. But if upon general grounds, and without regard to these considerations, a case of undue preference has been established, the natural consequence would be to order the company to desist from the preference. No order could be made as to *how* the inequality should be redressed, and the choice between the different ways in which it can be removed must always be left to the company. They would be obliged, however, either to level up, or to level down, or to do both. But suppose they can satisfy the Court that to level up would destroy a traffic which in the public interest ought to be secured, *and* that to level down would be to effect an "undue reduction" (whatever that may mean), it follows that for different reasons neither the one method of redressing the inequality, nor the other, nor a combination of the two, ought to be adopted, and that, therefore, the order ought not to be made. In other words, the state of things which creates the preference is justified, and the preference ceases to be "undue" within the meaning of the legislation.

It is not, I think, difficult to see how these words came to be introduced. The question had several times been mooted whether a rate so low as, when compared with another, to amount primâ facie to an undue preference, could be justified on the ground that it was rendered necessary by the existence of

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competitive modes of carriage, whether by land or water. The state of the authorities upon the matter was far from satisfactory. The dicta in *Harris* v. *Cockermouth Ry. Co.* (1), per Cockburn, L.C.J., and in *Ransome* v. *Eastern Counties Ry. Co.* (2), per Crowder, J., are, I think, very difficult to reconcile with the decision in *Budd* v. *London and North Western Ry. Co.* (3) The manner in which the question how far the necessities of competition will justify preferential charges was touched upon in *Garton* v. *Bristol and Exeter Ry. Co.* (4), throws no additional light upon the subject. *Budd's Case* (3) is open to the further observation (for which I am indebted to Sir F. Peel) that it is in conflict with the subsequent Scotch case of *Murray* v. *Glasgow and South Western Ry. Co.* (5) in the Court of Session, and the case of *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (6) in the English Court of Appeal, where it was laid down that an action will not lie to recover overcharges made in violation of the provisions of the Act of 1854 against undue preferences. When the *Denaby Main Case* (6) was in the House of Lords the question was not decided, and the state of the authorities has been discussed by Cave, J., in his judgment in *Lancashire and Yorkshire Ry. Co.* v. *Greenwood.* (7) The provisions of s. 27 of the Act of 1888 have all the appearance of a compromise. The railway companies maintained, of course, that the commercial necessity of competition ought to justify a rate otherwise indefensible. The traders insisted upon the contrary view. The legislature abstained from laying down the principle as contended for by either side, and contented itself with the cautious enactment contained in sub-s. 2 of s. 27.

The legitimate interests of the railway company are therefore not excluded from consideration. The commercial necessity of meeting competition is always a fact in favour of the company. If it does nothing more than negative the suggestion that the *motive* was to give a preference, it gets rid of a possible inference

(1) 3 C. B. (N.S.) 693, at p. 713.
(2) 4 C. B. (N.S.) 135, at p. 177.
(3) 4 R. & C. T. Cases, 393, n.; 36 L. T. (N.S.) 802.
(4) 6 C. B. (N.S.) 639.
(5) 4 R. & C. T. Cases, 456; 11 Court Sess. Cas. 4th Series, 205.
(6) 14 Q. B. D. 209; 11 App. Cas. 97.
(7) 21 Q. B. D. 215.

which would be fatal to the case of the company; but when, all things having been taken into consideration, the case bears the aspect of an undue preference, the company may still be saved from an adverse judgment if it can be established that for different reasons the lower rate ought not to be raised *and* (not *or*) the higher rate ought not to be lowered. The expression "whether such lower charge or difference in treatment is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made," though not a synonym for "whether competition makes such lower charge, &c., necessary to secure the traffic, and whether it is in the interests of the public that it should be secured," has its most frequent and practical application in the case of competition. Of course there might be other circumstances. For instance, there might be no competitive carrier, and yet the article might be one that people could do without, and would do without, unless the carriage was low, so that, if the freights were raised, the traffic would go altogether instead of going to a rival carrier. So that I think it would be erroneous to treat the question of competition as the only one to which the words under consideration can apply. In the present case, if the words under consideration were not in the section, or if that section had never been passed, I think it would have been impossible to justify the preference. I take into account the fact that but for the low rates the respondents would not get the Cardiff traffic in question at all; and I therefore think that the low charge was established, not for the purpose of giving a preference, but of securing the traffic. That, however, cannot be a justification of itself, otherwise there would be no occasion whatever for providing, as the section certainly has done, that something which necessarily includes this particular head of justification, but requires also a great deal more in order to satisfy the words used, should be capable of being treated not as a justification in itself but merely as an element of justification. There is no other circumstance that has been pointed out, or can be pointed out, tending to justify it; whilst mileage, route, necessity of sharing the rates with other companies, are all against the low rate.

I therefore have to ask myself whether the preference can be

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supported—because, first, the company cannot raise the Cardiff rates without losing a traffic which, in the interests of the public, ought to be secured; and, second, whether the company cannot lower the Liverpool rates without "unduly reducing" them.

As to the first question, putting the matter in its narrower aspect, we have only to deal with the traffic of the London and North Western Railway Company between Cardiff and Birmingham, but I think it impossible to forget or to throw out of consideration the fact that the London and North Western Railway is only one of three lines which serve Cardiff, and that practically the question is whether the traffic in grain, &c., from Cardiff to Birmingham as a whole ought to be secured in the interests of the public. The question is not whether it is in the interests of the public that two or more competing modes of carriage should exist. It is seldom that it is not in the interests of the public to have a choice of routes. Physically, however, the actual competing lines of railway communication do exist, and require nothing to complete them. To some extent the railways will always have the effect of holding the water carriers in check. But the question cannot be decided upon any such simple consideration. It is clear that the Act contemplates the possible existence of competition which may not be in the interests of the public although it be effectual to secure traffic. What we have to inquire is, whether it is in the interests of the public that the grain, &c., traffic by railway from Cardiff to Birmingham should be secured either generally or to any particular company? I find it very difficult to say *what* precise public interests are intended to be respected. Probably that is a question which was not thought of when the Act was passed. At all events the legislature has given no indication of what is meant. The public means, I suppose, nothing wider than the *British* public at any rate. But to the majority of the British public it is, and probably will ever remain, a matter of profound indifference whether the flour and grain which comes or is likely to come viâ Cardiff and the lines of railway from Cardiff, reaches Birmingham by that route, or viâ the Severn ports and the canals connected with them, or viâ Liverpool and rail or canal. Are the public interests meant, in such a case as this, those of Birmingham? If so, they

are clearly and necessarily opposed to the interests of the Liverpool traders. Just exactly in the degree in which and to which the Liverpool corn merchants may deem it an advantage to be freed from the competition of the Cardiff traffic, the public at Birmingham are interested in having the Cardiff traffic kept as it is; and I think that, however difficult it may be in any particular case to say what is or what is not in the interests of the public, the public must be a wider one than that of one of the two localities concerned. It is, however, as a general rule against the public interests that uncertainty should be introduced into trade by frequent or violent or arbitrary changes of the circumstances under which people engaged in business have to carry it on and to make their living. It is, as a broad general rule, against the public interests that artificial circumstances, which at the will or caprice or for the self-interest of any one man or body of men may be swept out of existence as lightly as they were perhaps created, should be permitted to interfere with the natural course of trade. These considerations appear to me to be weighty ones, and to afford broad and safe grounds for saying that it is not necessary in the present case to secure, in the interests of the public, the Cardiff traffic in question. On the other hand, no circumstance has been brought to our notice in the course of the present discussion to indicate that any important public interests will be affected if the traffic in grain, flour, and the like goods by rail from Cardiff to Birmingham should, by reason of our decision, be lost to the railway companies, and have to go by some other route. It is certainly a remarkable fact that no single trader from Cardiff has been called to say a word in support of the rates in question, or to point out the public interests involved.

That being my opinion, it is not strictly necessary to deal with the question whether the inequality could be removed by lowering the Liverpool rates without reaching the point of "undue reduction." I shall not attempt in this case to define what is meant by "unduly reducing." I am not prepared to say that it is necessarily an equivalent for "reducing so low as not to leave a fair margin of profit." I think it would be unwise to attempt a definition or paraphrase, because Mr. Pope has conceded that,

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whatever it may mean, the higher rates could in this instance be lowered so as to meet the inequality without undue reduction. Under those circumstances no serious argument as to the meaning and limitations of the phrase was likely to take place. Merely to show that like goods are carried by the respondents longer distances in the same part of the country for the same rates does not seem to me to be enough; or the results must be equal mileage rates without reference to cost of acquisition or construction, to quantity of traffic carried, and a host of other circumstances bearing upon the question; and I think it a matter in which the relative charges cannot be weighed in very nice scales. And there I leave the question upon the present occasion.

In the foregoing discussion I have not attempted to define the limits of the "public interests" referred to by the statute. Probably the attempt would be futile. Possibly the next case which came before the Court would show that it had been unsuccessful. Illustrations might easily be put. One can imagine, for instance, that as between a coalfield and a district which embraced a government dockyard, it might be of the greatest public importance, in time of war, say, that no obstacle of any kind should add a hair's weight to the difficulties of coaling our ships. If, in the present instance, the effect of raising the rates from Cardiff to something like the same level as the Liverpool rates would be seriously to interfere with the food supply of half the nation, the public interest might well warrant the lower rate in spite of the damage to the Liverpool merchants. Whilst it may undoubtedly be a most difficult inquiry whether this or that be for the public good, I would point out that the question is not altogether foreign to many which have from time to time been freely entertained by the Courts. Many a contract has been held invalid as contrary to public policy; and although, warned perhaps by the economic errors of their predecessors, judges have grown more cautious in laying down what is and what is not contrary to public policy, yet the jurisdiction remains, and is constantly exercised, and I agree with the Attorney-General that the difficulties in the way of satisfactorily determining such a question are no reason why the Court should be deterred from grappling

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with it. In the present instance, fortunately, the question appears to me free from serious difficulty.

Our judgment must be for the applicants, who must have their costs. I am authorized by Mr. Price to say that he concurs in this judgment.

SIR F. PEEL. This is a complaint against the London and North Western Company for creating an undue preference by the difference which they make in their gross rates for grain and flour from Liverpool and Cardiff respectively to Birmingham, the distances being very unequal in the two cases, and the longer distance being charged the lower rate. The Cardiff distance is 173 miles, the Liverpool 98½ miles, and while the rate for the 173 miles is 8*s.* 4*d.* per ton, that for the 98½ miles is 11*s.* 3*d.* The complaint is made by the Liverpool Corn Trade Association, as an authority empowered by the Act of 1888 to make complaint; and the question whether the inequality in the charges amounts to an undue preference does not now rest solely, as it would have done before, on s. 2 of the Traffic Act, 1854, but upon s. 27 of the Act of 1888 as well. One of the provisions of the latter section is, that whenever it is shown that a company charges traders in one district lower rates or charges for the same or similar merchandize, or for the same or similar services, than they charge to the traders in another district, the burden of proving that such lower charge does not amount to an undue preference shall lie on the company. It is, therefore, for the London and North Western Railway to show that they are justified in fixing a rate of charge from Cardiff to Birmingham so different from their corresponding rate from Liverpool. And the answer they make is, that the lower charge is necessary to secure the traffic, first, in their own interests, and secondly, in the interests of the public; and they further say that no damage has been produced by the Cardiff rate, and that on this ground alone there ought to be no order against them.

It is, of course, an object with every company to secure traffic and to induce traders to use its own line in preference to other lines; and if any particular traffic which it obtains is, by reason of quantity, distance, regularity of supply, or other incidents of

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carriage, able to be worked with more profit or at less cost than other similar traffic, there is no doubt the company carrying does not go beyond its rights, if for the carriage of such traffic it makes a lower charge than it imposes on traffic not offering the like advantages. But it is not equally clear that a traffic, which differs only from other traffic in being competitive, can have such a distinction made in its favour, however necessary a lower charge may be to meet the competition, or however much it may be to the benefit of a company to secure the traffic. It was urged on the part of the complainants that it never has been allowed that because part of some particular traffic which a company has admits of being competed for, it may in its own interests, and with reference merely to the competitive element, carry that part at a lower rate than it carries the rest of such traffic, and that even if there was no rule or enactment against a company so doing prior to the Act of 1888, it is otherwise now, s. 27 limiting the occasions when reduced charges may be granted to those in which they are necessary in the interests of the public.

Now I do not think this is the effect of s. 27, for the public interest in a lower charge is expressly said to be a matter which this Court may take into consideration "in addition to any other considerations bearing on the case;" and if, apart from these last words, the allowance of a lower charge in the public interests might seem to exclude regard being had to other kinds of interest, the insertion of the words "in addition, etc.," alters the case, and indicates an intention to extend and enlarge, and not to narrow, the grounds on which we may decide whether a lower charge amounts or not to an undue preference. Moreover, if it were a true construction of the section, that it makes public interests alone a justification of lower charges, it would follow that a company could no longer justify them in cases where it has always hitherto been allowed to do so. The section refers to all lower charges, whether made to meet competition or with reference to any other circumstances, and, according to the above view of it, it would make the Traffic Act, 1854 to be contravened by lower charges granted in consideration of such circumstances as diminished cost of carriage, for such charges do not necessarily

involve any public interests. I think, then, that the Act of 1888 does not, upon the question how far a competition justifies lower charges and prevents a preference from being undue, shut out any matters from being considered which might have been considered before. There do not appear to be any reported cases in which the question has been explicitly raised and decisions given applicable as precedents. *Budd's Case* (1) was cited for the view that a desire to compete would not justify a preference; but the doubts to which that case is subject make it very inconclusive as authority. On the other hand, there are not a few cases in which judicial opinions have been expressed, seeming to recognize as good a reduction founded on that consideration; but none of these were cases in which the judgment proceeded upon that ground. The present complaint, therefore, like complaints of undue preference caused in other ways, can only be determined by looking at all the circumstances, and coming to a conclusion upon them, as proved at the hearing.

Now, the complaint is that the differential rate from Cardiff to Birmingham enables the Cardiff trader in grain and flour to undersell in that market the Liverpool trader, and gives him an advantage which is not legitimate; and the answer is, that there are rates for grain and flour to Birmingham not only by other routes from Cardiff, but also from the Severn ports, and that both these sets of rates are in active competition with those of the respondents. But the traffic from the Severn ports is not traffic withdrawn from Cardiff, nor traffic from any place to or from which the respondents are carriers. It is traffic which goes by sea to Avonmouth or Sharpness, and thence to Birmingham by railway or canal: and having the advantage of being brought by sea to ports much nearer to Birmingham than Cardiff, it is carried to Birmingham by rail at such rates as 6*s.* 10*d.* from Sharpness and 7*s.* 8*d.* a ton from Monmouth. I do not think a desire to make Cardiff traffic compete with a traffic which has this natural advantage over it, and is wholly unconnected with it, is a valid ground for the London and North Western giving Cardiff rates which subject other places on their railway to disadvantage. What place, on that principle, which sent by the

(1) 4 R. & C. T. Cases, 393; 36 L. T. (N.S.) 802.

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North Western to the common point might not claim the same favoured treatment? It could be said almost everywhere that a charge complained of for inequality was influenced by competition, and was therefore justifiable. The other head of this part of the answer refers to the competition which the North Western has to maintain with other railway companies at Cardiff. also carrying to Birmingham, and whose rates for grain and flour are fixed at the same amount as the North Western rates. These companies are the Great Western and the Midland, and the Great Western not only carries the greater part of the traffic, but is also interested in every part of it, through an agreement scheduled to the West Midland Amalgamation Act, 1863. The effect of that agreement is that the traffic carried by the North Western must either be forwarded by the Great Western route viâ Tenbury and Bewdley, or be accounted for as if so sent; and under this arrangement the sum per ton which the North Western receive upon their Cardiff traffic is reduced from 8*s.* 4*d.* per ton to 6*s.* 7½*d.*; and therefore what they receive for their services in the one case and the other is still more out of proportion to distance, being 6*s.* 7½*d.* for 173 miles, as against 11*s.* 3*d.* for 98½ miles. There may be reasons for the Cardiff rate which do not appear on the evidence, but a company cannot have equal rates with other companies at the cost of inequalities on its own system merely that it may not be excluded from competing; and if any case ought to come within this rule, it is a case like this, where there is a rate at Cardiff out of which there can be little or no profit side by side with a rate at Liverpool admitted by counsel to be highly remunerative in amount.

Then as to the lower charge being necessary to secure the traffic in the public interests, this has not, I think, been made out to be the case. In the first place, the lower charge does not, in fact, secure the traffic, for a return put in on the part of the company shews the traffic to be a diminishing one, and to have decreased gradually from 950 tons in 1886 to 350 tons in the year ending June, 1890. The grain and flour traffic from Cardiff to Birmingham is for the most part a Great Western traffic: the quantity which was Great Western was 1219 tons in 1886 and 1292 tons in 1889. As regards the Midland, we have no

return of what that company carry, but Mr. Harrison, who was examined for the North Western, did not think it was much, as they carry over a route which, except for the part between Worcester and Birmingham, is not their own. But, at any rate, the public have in the Midland an alternative railway from Cardiff to Birmingham, and the point that was put by Mr. Pope, that it is a benefit to the public to have a choice of routes, and that a rate which makes a line available, as the North Western is made by its Cardiff rate, however little for the moment the public may avail themselves of it, is of service to them, does not strike me as of much force where the public are already in possession of more than one route. But even supposing the lower charge to be a good one on this ground, and the applicants to be shewn not to be entitled on this score to relief, there would then come the question, under s. 27 of the 1888 Act, whether the inequality between rate and rate which that lower charge produces could not be removed by a reduction of the higher or Liverpool rate; but it is unnecessary for me to consider that question, because I do not think public interests are involved in the maintenance of the lower charge, or in the North Western securing the grain traffic which it carries from Cardiff to Birmingham.

As to the matter of damage, public bodies may complain without proof that they are aggrieved, and perhaps any person has the same right in this respect in the case of complaints of unequal rates that public bodies have in all cases. But I agree with Mr. Pope that a preference, to be held to be undue, must be injurious to those who complain of it, or who are represented by a public body appearing as a complainant. It is, however, part of the burden cast upon a railway company which has a complaint made against it for charging unequally, to have to prove the contrary as to damage. In this case, however, we have positive evidence as to damage given by the complainants, and the statement of more than one of their witnesses, traders in business at Liverpool, and sending grain and flour to Birmingham, is to the effect that the lower Cardiff charge has operated to their prejudice, and that but for a difference of charge for railway carriage equal to 3*d.* or 4*d.* a sack, their sales or orders would not have

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fallen off, as they find them to have done, and that as to some descriptions of goods charged at grain rates, such as milling offals, they are completely undersold by their Cardiff rivals. The only answer given to these statements is that the Liverpool grain and flour trade with Birmingham shews no decrease in the aggregate, and that the carrying of the London and North Western Railway and of the Shropshire Union Canal together were 13,805 tons in 1886, 19,047 in 1887, 15,430 in 1888, and 26,689 tons in the year ending June 30 last, and that the effect on prices at Birmingham of 330 tons from Cardiff must be very insignificant. We have, I think, no return separating the tonnage by railway from that by canal except for the year to June 30, 1890, in which year, out of the 26,689 tons, the North Western carried 8803 tons. But the condition of the Liverpool grain trade in general is not much in point when the question to be settled is whether the persons represented by the applicants have undergone loss by the lower charges granted to other persons under circumstances which, as far as services performed are concerned, furnish, as admitted, no ground for the relative lowness of the charge from Cardiff, and of which it cannot be said that they comprise such fair interests of the company, or interests of the public, as to be justifying on either of these grounds; and I think upon the evidence given before us, that question must be decided in favour of the complainants. I will only add, as regards the alleged insignificance of the Cardiff traffic, that the 330 tons carried by the North Western is not all the traffic from that place that competes at Birmingham. There is, as we see, considerably more besides, and if the disadvantageous effect complained of is actually produced, and the extent of the traffic in all is not inconsistent with its being produced, all parts alike must, I think, share in the responsibility of causing it. I consider, on the whole, that a case has been made out for the order asked.

Judgment for the applicants.

Solicitors for applicants: *Neish & Howell.*
Solicitor for respondent: *C. H. Mason.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1890
Oct. 31;
Nov. 14.

IN RE EVANS. EX PARTE EVANS.

Bankruptcy—Administration in Bankruptcy of Estate of Deceased Insolvent Debtor—Jurisdiction—Debtor resident Abroad—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 95, 125, 127—*Bankruptcy Rules*, 1886, *r.* 274; *Appendix, Part I., Form* 11.

A petition by a creditor for the administration according to the law of bankruptcy of the estate of a deceased insolvent, ought, if the debtor was not resident in England and died out of England, to be presented to the High Court of Justice.

APPEAL against an order under s. 125 of the Bankruptcy Act, 1883, for the administration in bankruptcy of the estate of R. M. Evans, who died insolvent on May 5, 1889.

The debtor was a domiciled Englishman, but for some years before his death he had continuously resided at Mayumba, in the French territory of the Gaboon, on the West Coast of Africa, where he carried on the business of a merchant, and he died there. His wife and family resided in Liverpool. By his will he appointed his wife executrix, and she proved the will in the Court of Probate on September 28, 1889. The petition on which the order was made was presented on June 30, 1890, by E. Edwards, who claimed to be a creditor of the deceased in the amount of 1745*l.* 16*s.* for goods sold and delivered.

J. Rutherford, for the executrix. Sect. 125 (1) does not apply to this case, and the High Court had no jurisdiction under such

(1) By s. 125: "(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy.

"(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shewn, dismiss such petition with or without costs."

"(10.) Unless the context otherwise requires, 'Court' in this section

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circumstances to make the order for administration. No English Bankruptcy Court had any jurisdiction over the debtor. The context of s. 125 does not require that the expression "the Court" shall be read otherwise than as defined in that section. The registrar thought that the reference to s. 95 contained in Form No. 11 in the Appendix to the Bankruptcy Rules, 1886, shewed that regard must be had to that section. But, even if that be so, the earlier part only of the section is incorporated with s. 125.

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means the Court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease."

"(11.) General rules for carrying into effect the provisions of this section may be made in the same manner and to the like effect and extent as in bankruptcy."

By s. 127 (1.): "The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act.

"(2.) All general rules made under the foregoing provisions of this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

"(3.) Such general rules as may be required for purposes of this Act may be made at any time after the passing of this Act.

"(4.) Provided always, that the said general rules, so made, revoked, or altered, shall not extend the jurisdiction of the Court.

"(5.) After the commencement of this Act no general rule under the provisions of this section shall come into operation until the expiration of one month after the same has been made and issued."

Sect. 95 (1.): "If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district, as defined by this Act, for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court."

By r. 274 of the Bankruptcy Rules, 1886: "A creditor's petition under s. 125 of the Act shall be in the Form No. 11 in the Appendix, with such variations as circumstances may require."

Form No. 11 in the Appendix is headed: "Creditor's petition for administration of estate of deceased debtor under s. 125." The form contains (inter alia) the following paragraph:

"That the said A. B." [the deceased debtor] "for the greater part of the six months next preceding his decease resided [*or* carried on business] at , within the district of this Court [*or, as the case may be, following the terms of s.* 95]."

[LOPES, L.J., referred to *In re Baker*. (1)]

Commins, for the petitioning creditor. The rules are to be taken as part of the Act. The context requires that in such a case as the present, the word "Court" in s. 125 shall be read "otherwise" than as defined in sub-s. 10 of s. 125. Form 11 shews that s. 95 is to be regarded, and the debtor was not resident in England at the time of his death. Consequently the High Court has jurisdiction.

Rutherford, in reply. The "context" in sub-s. 10 of s. 125 means only the "context" of s. 125 itself. Sect. 95 is not applicable; it cannot be said that a dead man is "resident" in one place more than another. If the registrar's decision is right, the jurisdiction of the Court will be extended by the rules, and this is forbidden by s. 127, sub-s. 4.

Cur. adv. vult.

Nov. 14. LORD ESHER, M.R. The registrar has made an order under s. 125 for the administration according to the law of bankruptcy of the estate of a deceased debtor, and the executrix of the deceased has appealed, on the ground that under the circumstances of the case the court of bankruptcy had no jurisdiction to make the order. The debtor died indebted to the petitioner in an amount sufficient to support a bankruptcy petition against him, had he been alive. He had for the six months immediately prior to his decease resided in Africa, where he was carrying on business, and he died in Africa. Sub-s. 10 of s. 125 of the Bankruptcy Act, 1883, is relied upon to shew that the London Bankruptcy Court had no jurisdiction to make the order, and no doubt it is impossible to say that the debtor for the greater part of the six months immediately prior to his death resided or carried on business within the jurisdiction of any court in this country. But sub-s. 10 says that, "unless the context otherwise requires," the word "Court" in that section means the Court within the jurisdiction of which the debtor resided or carried on business for that period. It is suggested that the word "context" is confined to the "context" of s. 125 itself; but I can see nothing to limit the word in that way. I think it means the context of

(1) 44 Ch. D. 262.

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IN RE EVANS. EX PARTE EVANS.

Lord Esher, M.R.

the whole Act. That being so, we turn to s. 95, and there we find that, if a living debtor against whom a bankruptcy petition is presented is not resident in England, the petition is to be presented to the High Court—that is, to the London Bankruptcy Court. Then, again, we find that the Form No. 11 in the Appendix to the Bankruptcy Rules, 1886, which is the form prescribed by r. 274 for a creditor's petition under s. 125, contains those directions in brackets, "or as the case may be, following the terms of s. 95," which, it appears to me, shew that the framers of the rules supposed that s. 125 would comprise cases which are within s. 95. The debtor in the present case was clearly within the words of s. 95, as being "not resident in England"; and if, as I think it does, the word "context" in sub-s. 10 of s. 125 means the whole Act, the present case is clearly one in which the context requires that the word "Court" in s. 125 should mean the "High Court," and the petition was properly presented in that Court. The order of the registrar was right, and the appeal must be dismissed.

LOPES, L.J. I am of the same opinion, and my brother Lindley has authorized me to express his concurrence.

Appeal dismissed.

Frank Evans, for the executrix, asked that her costs, charges, and expenses might be allowed out of the estate, as they would be in an administration action in the Chancery Division.

Rentoul, for the petitioning creditor.

The COURT refused the application.

Solicitors: *Hamlin, Grammer, & Hamlin, for Wills Harper, Liverpool: Ridsdale & Son, for Raymond Steinforth, Liverpool.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1890
Dec. 12.

IN RE LOW. EX PARTE THE ARGENTINE GOLD FIELDS, LIMITED.

Bankruptcy—Act of Bankruptcy—Bankruptcy Notice—Joinder of several Judgment Debts—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

Two or more judgment debts cannot be included in the same bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*).

APPEAL by the Argentine Gold Fields, Limited, against the refusal of a registrar to issue a bankruptcy notice against Low.

It appeared that the company had recovered judgments for calls, to the amount in each case of 30*l*., in two separate actions, and they applied to the registrar to issue a bankruptcy notice including in it both the judgments. This the registrar declined to do; but he offered to issue two notices, one in respect of each debt.

Whinney, in support of the appeal. Non-compliance with a notice founded on either of the judgment debts would not enable the company to present a bankruptcy petition if, as is probable, the debtor satisfied one of the judgments. If they can be combined in one notice, then the debtor could not avoid the presentation of a petition unless he satisfied the notice by paying both debts. By rule 136 the notice is to be in Form No. 6 in the Appendix, "with such variations as circumstances may require;" and the section and rule should be read as including the plural, although the singular is used throughout. If this is done, the form of notice could be varied by inserting particulars of each of the debts. By s. 7, sub-s. 3, if the Court for any sufficient reason think that no order ought to be made, the petition may be dismissed, and this is sufficient protection to the debtor if he has a set-off or any other answer to either of the judgment debts. The words of the Bankruptcy Act, 1869, s. 6, sub-s. 6, are quite as strong as those of this Act, yet it was held that two or more creditors could join in one debtor's summons: *Ex parte Kibble* (1); *In re Andrew*. (2)

(1) Law Rep. 10 Ch. 373.

(2) 1 Ch. D. 358.

C. A. 1890

IN RE LOW. EX PARTE ARGENTINE GOLD FIELDS.

LORD ESHER, M.R. The only difficulty suggested in following the words of the section is that, if they are taken literally, in a case where there are two notices, one in respect of each judgment debt, the debtor might pay on one, and so no bankruptcy petition could be presented. I do not think that is a sufficient reason for reading the words of the section otherwise than as they are written. In the section itself one debt only is spoken of, and the rule and the form of notice carry out the same idea. That this was intentional appears from a comparison with s. 6, sub-s. 1 (*a*), where in a case where two or more creditors may join in an act this is expressed in terms. The power to join two or more judgment debts in one notice could equally have been expressed, and, as it is not, I think it must have been meant that only one judgment debt should be the subject of each bankruptcy notice. Another reason for coming to the same conclusion is that otherwise there would be taken away from the debtor a right that he undoubtedly has to satisfy one of the notices, or to raise a counter-claim, set-off, or cross-demand to it, and so prevent its being used for the presentation of a bankruptcy petition. The registrar was right, and the appeal must be dismissed.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicants: *Lyne & Holman.*

A. M.

In re CASTIONI.

1890
Nov. 10, 11.

Criminal Law—Extradition—Offence of a Political Character—Jurisdiction to review Decision of Magistrate—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 3 (1).

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."

Held, that the true meaning of this expression is that suggested in Sir James Stephen's History of the Criminal Law, vol. ii., p. 71, and therefore that to bring an offence within the meaning of the words "of a political character," it must be incidental to and form part of political disturbances.

A number of the citizens of one of the cantons of the Swiss Republic, being dissatisfied with the administration of the government of the canton, rose against the Government, arrested several members of the Government, seized the arsenal, from which they provided themselves with arms, attacked, broke open, and took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some members of the Government, and established a provisional government. On entering the municipal palace the prisoner, who had taken an active part in the disturbance throughout, shot with a revolver and killed a member of the Government. He escaped to England, where he was arrested and committed for extradition on a charge of murder.

On a motion for habeas corpus:—

Held, that the offence which the prisoner had committed was incidental to and formed a part of political disturbances, and therefore was an offence of a political character within the meaning of the statute, and the prisoner could not be surrendered, but was entitled to be discharged from custody.

The decision of a magistrate, who commits a prisoner for extradition, that the offence charged is not of a political character, is subject to review by the Court on an application for habeas corpus.

Application for habeas corpus.

The motion was made on behalf of Angelo Castioni, for an order nisi calling upon the Solicitor to the Treasury, Franklin Lushington, Esq., a metropolitan police magistrate, and the consul-general of Switzerland, as representative of the Swiss Republic, to shew cause why a writ of habeas corpus should not issue to bring up the body of Castioni in order that he might be discharged from custody.

The prisoner Castioni had been arrested in England on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him

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committed to prison for the purpose of extradition, on a charge of wilful murder alleged to have been committed in Switzerland.

The facts, which were contained in depositions sent from Switzerland, in the depositions taken before the magistrate at Bow Street, and in affidavits used on the hearing of the motion, were shortly as follows (1):—

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the Government for a revision of the constitution of the canton, under art. 15 of the constitution, which provides that "The constitution of the canton may be revised wholly or partially . . . . (*b*) at the request of 7000 citizens presented with the legal formalities. In this case the Council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, prescribes the course to be adopted for the execution of letter (*b*) of art. 15. The Government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested, and bound or handcuffed, several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to

(1) Another document was before the Court, viz., a message from the Federal Council of the Republic of Switzerland to the Federal Assembly, after the disturbances had been put an end to, but was used only as being material to the question whether the offence charged was an offence of a political character, and was not accepted as evidence of the facts therein stated (see the judgment of Denman, J., post, p. 158).

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the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in s. 3 of the Extradition Act, 1870 (1) did not exist, and committed Castioni to prison.

(1) 33 & 34 Vict. c. 52, s. 3: "The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

"9. When a fugitive criminal is brought before the police magistrate the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

"The police magistrate shall receive

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Sir Charles Russell, Q.C. (*J. P. Grain* and *Eldridge*, with him), for the prisoner. Looking at all the facts now before the Court, it is clear that the offence with which the prisoner is charged is an offence of a political character within the meaning of s. 3 of the statute (33 & 34 Vict. c. 52) and article 11 of the treaty. On the evidence two conclusions are irresistible—first, that there was a political rising; and secondly, that the shot which caused the death of Councillor Rossi was fired at a moment when the tumult occasioned by that rising was at its height; and further, assuming for the purpose of argument that the shot was fired by Castioni, the evidence shews conclusively that he was taking an active part in the rising. It seems doubtful whether there ever

any evidence which may be tendered to shew that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

"10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

"Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly."

By s. 26: "The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act."

The first schedule includes murder and manslaughter.

By the extradition treaty with Switzerland, dated November 26, 1880, article 11: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character."

Article 2 includes murder and manslaughter.

was such a thing as extradition at common law. The more correct view seems to be that the right of asylum was absolute: *Reg.* v. *Bernard* (1), per Lord Campbell, C.J. If this is so, the right to extradition is created by and depends on the statutes 33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60; and if it is shewn that the case comes within the exception introduced by the words, "an offence of a political character," in s. 3 of the earlier Act, no right to extradition can exist. The burden of proof is on those who demand extradition, and there is no evidence to shew that the act was an act of private revenge or prompted by personal malice. On the contrary, the whole of the evidence points the other way.

The expression "of a political character" is, no doubt, vague, and probably intentionally so. It seems as if the legislature had purposely abstained from attempting to give an exhaustive definition, leaving it to the Court to decide in each case as it arose whether the exception applied. This view is supported by the extract from Lord Stanley's speech in the House of Commons, of August 3, 1866, cited in Clarke on Extradition, 3rd edition, Appendix, pp. cclix., cclx., to which it may be admissible to refer for the purpose of illustration; and on the same occasion Mr. J. S. Mill suggested the following definition: "Any offence committed in the course of or furthering of civil war, insurrection, or political commotion." (2) If this definition is correct, it certainly includes the present case. In Mr. Justice Stephen's History of the Criminal Law, after dealing with and illustrating the question, the author suggests the following definition: "I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances." (3) This Court is not bound by the decision of the magistrate. *Ex parte Huguet* (4) and *Reg.* v. *Maurer* (5) are

(1) Annual Register for 1858, p. 328.
(2) Clarke on Extradition, 3rd edition, Appendix, p. cclx.
(3) Sir J. F. Stephen's History of the Criminal Law, vol. ii., p. 71.
(4) 29 L. T. (N.S.) 41.
(5) 10 Q. B. D. 513.

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distinguishable, because here the Court has materials which were not before the magistrate.

[DENMAN, J., referred to *In re Counhaye.* (1)]

The *Attorney-General* (*Sir Richard Webster, Q.C.*) (*R. S. Wright* with him), for the Crown, and the *Solicitor-General* (*Sir Edward Clarke, Q.C.*), and *Robert Woodfall*, for the Federal Government of the Republic of Switzerland (2), by arrangement, shewed cause in the first instance.

The magistrate has rightly found that the offence was not of a political character, and his finding ought not to be overruled. The definition suggested by Mr. Mill is incorrect. The effect of adopting it would be to introduce a dangerous doctrine; for it would give immunity from extradition to persons who, without any political object in view, joined in a rising for the sole purpose of gratifying personal malice, or for the sake of plunder. The definition in Mr. Justice Stephen's History of the Criminal Law is more accurate, and would not include the present case. The burden of proof is on the party seeking to bring the case within the exception. The fact that Castioni had been absent from Ticino for so many years is against him rather than in his favour, for it is inconsistent with the view that he took any real interest in the political affairs of the canton. The admission by Bruni, who himself took a leading part in the disturbance, that "the death of Rossi was a misfortune, and not necessary for the rising," is strong evidence against the proposition that the act of Castioni was "incidental to and formed a part of political disturbances," within the meaning of Mr. Justice Stephen's definition already referred to. [They also cited *Re Woodall* (3); *In re Guerin* (4); Billot, Traité de l'Extradition, p. 102; Phillimore's International Law, vol. i., c. xxi., pp. 437–462, in 2nd edition.]

Sir Charles Russell, Q.C., replied.

(1) Law Rep. 8 Q. B. 410.

(2) By article 9 of the Extradition Treaty: "In cases where it may be necessary the Swiss Government shall be represented at the English Courts by the law officers of the Crown, and the English Government in the Swiss Courts by the competent Swiss authorities."

(3) 16 Cox, C. C. 478.

(4) 58 L. J. (M.C.) 42.

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DENMAN, J. Looking at the extreme importance of this case I should have been disposed, if I had felt any serious doubt as to the course we ought to pursue, to have taken time, not so much to consider what our judgment should be, as to take care to put it in the best possible shape, or even to reduce it to writing. But there are many considerations which apply to cases of this sort. One is, that here is a man in custody who has been in custody for a considerable time, and no greater delay than is reasonably necessary ought to be interposed if our decision should be one to the effect that he ought not to be in custody any longer. I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged.

There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light has been thrown upon the possible and probable meaning of the words by the arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities, and in one case by a most learned philosopher. I think it has been useful in such a case as this that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother whose assistance we have on this occasion in deciding the present case. I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be

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legally applied to the words used in the Act of Parliament. Sir Charles Russell suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is equivalent to "in the course of." I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act.

Sir Charles Russell has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that if there be an extraditable offence, the onus is upon the person seeking the benefit of those words to shew a case in which extradition can be avoided. I do not myself think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as on whom is the onus. I do not think it is intended that a scrap of a primâ facie case on the one side should have the effect of throwing upon the other side the onus of proving or disproving his position. I look at the words of the Act themselves, and I think that they are against any such narrow technical mode of dealing with the case. The words of s. 3, sub-s. 1, are: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." The section itself begins: "The following restrictions shall be observed with respect to the surrender of fugitive criminals." There is nothing said as to upon whom is the onus probandi, or that it shall be made to appear by one side or the other in such a case. It is a restriction upon the

surrender of a fugitive criminal, and however it appears, if it does appear, that the act was in the judgment of the Court an offence which would otherwise be an offence according to the laws of this country, but an offence of a political character, then, wholly irrespective of any doctrine of onus on the one side or the other, that is within the restriction, and he cannot be surrendered. It was at first contended, in opposition to the application for a habeas corpus, that if the magistrate upon this question once made up his mind, the Court had no jurisdiction to deal with it. It appears to me that this proposition cannot be maintained on the very face of the Act itself, which requires by s. 11 that the magistrate shall inform the prisoner that he may apply for a habeas corpus, and if he is entitled to apply for a habeas corpus I think it follows that this Court must have power to go into the whole matter, and in some cases, certainly if there be fresh evidence, or perhaps upon the same evidence, might take a different view of the matter from that taken by the magistrate.

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to shew that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly shew that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one

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member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and in the attack against the Government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case.

Before dealing with the evidence, I will say one thing about the message which was objected to and which was read after a slight discussion, upon the understanding that we were not going to use that document as evidence of any particular fact, but that it would be only used as an important document shewing that the Government of the country had themselves looked upon this as a serious political rising, and a serious state of violence by a very large body of the people against the Government. I mean so to use it, and have never thought of using it in any other way. I think that was the understanding upon which we allowed it to be read, and I feel that I am not justified in using it for any other purpose. Then it is reduced to the question of whether, upon the depositions sent over and upon the depositions before the magistrate and upon the fresh facts, if there be any, which are brought before us on the affidavits, we think that this was an act done, not only in the course of a political rising, but as part of a political rising. Here I must say at once that I assent entirely to the observation that we cannot decide that question merely by considering whether the act done at the moment at which it was done was a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of the words of the statute if we were to attempt so to limit it. I mean, I do not think it would be right to limit it in the way suggested by the cross-examination of Bruni, namely, by considering whether it was necessary at

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that time that the act should be done. The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part. Now, the only shadow of a suggestion of evidence to the contrary, I think, is the suggestion which appears on the face of some of the documents that he said something about his brother having been assassinated some years before. It was said in the message, which I have already said I do not rely upon as a statement of fact, that he did at the time he fired use the expression, "My brother's death cries for vengeance!" That is in the document, and is a statement of fact which I do not rely upon, and I do not think that I am justified in relying upon it, though, if I commented on that, I should certainly say it was quite as capable of the construction put upon it by Sir Charles Russell that he was not intending to murder Rossi, of whom he knew nothing, and of whose connection with any injury towards his brother there is not the slightest particle of evidence, as that it means anything of the kind suggested. Then it amounts to very little, and it comes to a discussion as to the facts of the case, and as to what was taking place at the exact moment at which the shot was fired. I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot—that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have

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supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J. I am of the same opinion. The prisoner is asked to be given up on a charge of that which undoubtedly is an extradition crime under this treaty—that is, for the crime of murder, and undoubtedly he ought to be so given up, provided there is primâ facie evidence of the crime of murder having been committed, unless, indeed, it is shewn that the offence of murder in respect of which his surrender is asked, is one which was a political offence. Now, the question whether there is primâ facie evidence that Castioni committed an extradition crime—that is, the crime of murder—is one which I may dispose of in a very few words. Nobody can doubt that Rossi was shot by a revolver fired by Castioni; about that there seems to be no real question. Under what circumstances he shot him, and when, possibly would be matters which would be capable of argument before the tribunal before whom he might be tried. Of course, if it could be established before the Court that he had deliberately taken a pistol, and that he had aimed it at Rossi without any justification of any sort or kind, and had caused the death of Rossi, there would have been an abundant case—a case on which he ought to have been tried according to our law for the crime of murder, and punished in respect of that crime; but it is said—

and said, I think, rightly—that he ought not to be given up upon this ground—that the offence of which he was guilty, if he was guilty of that offence, was of a political character. That is, the murder with which he is charged was in itself of a political character. Now, the matter has been before the magistrate, and the magistrate, acting upon the information and the evidence before him, has come to the conclusion that two things exist: first of all, that there is abundance of evidence to justify him in committing the man to be tried for murder—that is to say, there would have been had his crime been committed in this country; and secondly, he has come to the conclusion, rightly or wrongly, on which I shall have a word or two to say, that the offence was not of a political character, and that therefore he ought to be given up. The matter now comes before us—I will not say to review the whole of his decision—but to ask ourselves as to whether or not, having regard to the whole of the circumstances which are now brought to our attention, and which are proved by the depositions and other evidence in the case, we come to the same conclusion as the magistrate, or whether we deliberately arrive at an opposite conclusion.

Now, it seems to me to be impossible to say, for the reasons which were stated in the course of the argument, that if the man has a right to move for a habeas corpus in order that the case may be reviewed, or for the purpose of getting his discharge, he might not enter into matters which shewed that he had been guilty of no offence at all; and I should have said that by no means was the matter concluded by the magistrate's decision that he be committed for trial, because the magistrate does not sit, when he is committing for trial, as a magistrate sitting finally to dispose of the case and to give judgment upon it; but he states his opinion that there is a primâ facie case, and on that ground he signs his warrant of committal. Again, with reference to the question of whether the magistrate has a right to deal with a man and to deal with his objection to being committed for trial for an extradition crime, I entertain no doubt that the magistrate has no right and no jurisdiction to find finally, as against the prisoner, whether or not he has committed that crime which he is charged with having committed, or whether that

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crime is one of a political character. I desire to call attention to certain provisions in the Extradition Act. First, by s. 3, a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, such as treason, or other matters, or if he proves to the satisfaction of the police magistrate that the requisition for his surrender has in fact been made with a view to try him for an offence of a political character. These latter words undoubtedly tend to shew that Sir Charles Russell was wrong in the view that he took that the onus is upon those who seek for the extradition to shew that the offence committed is not of a political character, because it must be upon the person who seeks to be discharged on the ground that his surrender is, in fact, asked for with the view to punish him for an offence of a political character; the onus of establishing that is upon the alleged criminal himself. Now s. 9 and s. 10 seem to me to have some bearing on the question as to whether or not the offence with which a man is charged is of a political character. First of all, the 9th section enacts that, "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." If he were charged before the magistrate with an indictable offence committed in England, the question of whether or not the offence for which he was indicted were of a political character or not would make no difference. But, under this section the magistrate is to deal with him as though the offence charged were an indictable offence committed in England. Then the section goes on to say: "The police magistrate shall" not adjudge that the offence is of a political character, but he "shall receive any evidence which may be tendered to shew that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime." It seems to me that the language of this part of the 9th section in itself shews that the onus is on the person who seeks to absolve himself or exonerate himself from the liability to be handed over to the Government of the territory within which

the crime was committed. I find here in furtherance of what I am about to say about this question of the jurisdiction of the magistrate, s. 10, which is, to my mind, by no means unimportant: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." It does not seem to give the magistrate himself the power of dealing with the matter other than this: he is to consider whether the crime is one which, if committed in England, would have made it imperative upon him in discharging his duty to commit the man to prison. If so, he is to commit him to prison; but he is, as I have already shewn, by s. 9, obliged to receive any evidence which may be tendered to shew that the crime is of a political character, and that is analogous to the provisions in Russell Gurney's Act (30 & 31 Vict. c. 35), which make it the duty of a magistrate, if a prisoner wishes to call evidence in support of a defence which he intends to set up when he comes to be indicted, to take that evidence and hand it over to the tribunal before whom the prisoner is ultimately to appear. In furtherance of this view that I take, I read the 11th section: "If a police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus," which may very well mean this: "I have power to commit you to prison because I am satisfied that you have been guilty of a crime to which the extradition law and treaty apply; you have a right to have any evidence taken on your behalf to shew that you are a criminal who ought not to be sent out, because your offence, even if committed, was of a political character. I will take the evidence for you. You have fifteen days to make application for your release if you think fit to move for a habeas corpus." What follows afterwards shews that it is not the magistrate who is to determine these matters, but it is the Home Secretary who is

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to determine whether or not ultimately the prisoner is to be sent abroad, because the second part of the 11th section goes on to say: "Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal." These are the provisions of the Act, and they are quite sufficient to satisfy me that the magistrate's decision is by no means binding, either in point of law or in point of fact, and that when these matters come to be considered upon the habeas corpus, if the judges have to consider the case they must consider the case as it is before them at the time the rule is discussed; and I think that in considering the matter, though we pay respect to the magistrate's view, we are not bound to follow it at the expense of the criminal, if upon the whole state of things before us, we come to the conclusion either that the crime has not been committed, and that there is no primâ facie evidence of it, or that the criminal ought not to be sent out to his own Government for the purpose of being dealt with by reason of his offence being, though a crime, a crime of a political character. I do not myself mean to travel through the facts, which seem to me to be simple enough. There can be no doubt at all that there was evidence of a crime, and I concede that if it were not of a political character the man ought to be sent out under the warrant of the Secretary of State; but that brings me to the question whether upon the present occasion, even assuming there to be the most cogent evidence of the crime of murder, he ought to be sent out, having regard to that provision which says that he shall not be so sent out if the offence with which he is charged is one of a political character.

Now, I entirely dissent, and I think all reasonable persons would dissent, from the proposition that any act done in the course of a political rising, or in the course of any insurrection, is necessarily of a political character. Everybody would agree, I

think, with this—that it is not everything done during the period during which a political rising exists that could be said to be of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he were engaged in a political rising, if he were deliberately, for a matter of private revenge or for the purpose of doing injury to another, to shoot an unoffending man, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of the crime of murder, because that offence so committed by him could not be said to have any relation at all to a political crime, namely, a crime which in law ought to be punished with the punishment awarded for such a crime.

Now, what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, "political character"; but I adopt his definition absolutely. "The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying

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on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act.

Now, was this act done by Castioni of a political character? That there was a general rising of one party there can be no doubt. They were as it were levying war against the Government. That they anticipated violence or violent resistance there can be little doubt. The very fact that five men of the opposite party were bound and put in front of those who were making the attack shews the object. "We expect an attack to be made upon us; we expect personal violence; and these five persons are the most likely if they are put in front to deter those who would offer violence to us from doing so." I think it is immaterial whether or not one gate was broken open, or whether the gates had been burst open or not. The question really is whether or not this was an act done by this prisoner in his character of a political insurgent at that time, and I do not think it signifies whether or not he had come into Bellinzona on the day before, or in the morning of the day on which this occurrence took place. If he was a citizen of the place, taking his part in a movement of a political character, which he chose to join in because he thought it was for the benefit of the political side to which he desired to attach himself, I cannot come to the conclusion that he is to be deprived of the privilege of the refuge afforded to him simply because, even after the palace was broken into, having a revolver in his hand, he did make use of

it in a way which is very much indeed to be deplored, because I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or any one of the community had ever personally done to him. When it is said that he took aim at Rossi, there is not a particle of evidence that Rossi was even known to him by name. I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over. For the reasons I have expressed, I am of opinion that this rule ought to be made absolute, and that the prisoner ought to be discharged.

STEPHEN, J. I am of the same opinion. I published some years ago a book which has been considerably quoted to-day, and in the passage in which I stated my views upon this subject. I gave what appeared to me to be the true interpretation of the expression "political character." It is very easy to give it too wide an explanation. I think that my late friend Mr. Mill made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to

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misunderstand it. Having given my view upon that subject, I shall say no more with regard to the interpretation of the Act of Parliament.

I will say only with respect to the facts, that it is obvious to my mind that the shooting on this occasion took place in a scene of very great tumult, at a moment when, if a man decided to use deadly violence, he had very little time to consider what was happening and to see what he ought to do, and that, therefore, he was committing an act greatly to be regretted. I feel no doubt that the habeas corpus ought to go, and that the prisoner ought to be set at liberty.

Rule absolute.

Solicitor for the Crown and for the Swiss Government: *The Solicitor to the Treasury.*

Solicitor for the prisoner: *W. H. Phelan.*

P. B. H.

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Oct. 30, 31; *Nov.* 1.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SALFORD *v.* LEVER.

Principal and Agent—Fraud—Bribe paid to Agent by Third Person contracting to supply Goods to Principal—Amount of Bribe added to Price of Goods—Remedies of Principal against Agent and Third Person.

Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first.

The plaintiffs were proprietors of gasworks, and it was the duty of their manager to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, a coal merchant, submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders, and with the view of procuring the manager's recommendation of them, the defendant corruptly agreed to pay to the manager a secret commission or bribe of 1s. per ton, and, in order to recoup himself for the commission so promised, he inserted in the tenders prices which were in excess by 1s. per ton of the prices which he would

otherwise have asked. The manager, being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. The defendant delivered the coals to the plaintiffs, and was paid the prices named in the tenders. He also paid to the manager a considerable portion of the commission which he had promised. The manager received similar bribes from various other contractors, who in like manner obtained from the plaintiffs prices in excess of what they would otherwise have asked. The plaintiffs, upon discovery of the frauds, entered into an agreement with their manager that he should assist them, by giving the necessary information and evidence, to bring actions against the contractors (including the defendant) for the recovery of damages for the loss sustained by the plaintiffs in consequence of the frauds, that he should guarantee that the damages recovered in such actions should amount to a certain specified sum, that by way of security for the due performance of the guarantee he should deposit in a certain bank securities to the value of the sum guaranteed, that any sums recovered in such actions should be taken in part satisfaction of the guarantee, and that upon receipt by the plaintiffs of the full guaranteed sum they should give the manager a complete discharge. The manager duly deposited the securities in the bank. After the agreement had been entered into and the securities deposited, the plaintiffs brought an action against the defendant to recover the additional 1*s.* per ton paid to him for the coal supplied. It was contended by the defendant that the plaintiffs' cause of action was for a tort in respect of which the defendant and the manager were joint wrongdoers, and that the agreement between the plaintiffs and the manager, coupled with the deposit of the securities by the latter, amounted to a discharge of the manager by way of accord and satisfaction, and consequently operated to discharge the defendant also:—

Held, by the Court of Appeal (affirming the judgment of the Queen's Bench Division), that the facts relied on afforded no defence to the action.

APPEAL by the defendant against the refusal by the Queen's Bench Division (Denman, Charles, and Vaughan Williams, JJ.), of his motion for a new trial. (1)

The plaintiffs were the proprietors of the gasworks in their borough. From 1875 to 1887 one Samuel Hunter was employed by them as the manager of their gasworks, and in that capacity it was his duty to examine tenders for the supply of coals for the purpose of the gasworks and to report and advise the plaintiffs thereon. The defendant, who was a coal merchant, submitted to the plaintiffs between the years 1875 and 1878 several tenders for the supply of coal. Before submitting the tenders, and with the view of inducing Hunter to advise the plaintiffs to accept them, the defendant corruptly agreed to pay to Hunter a secret

(1) 25 Q. B. D. 363.

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commission or bribe of 1*s.* per ton on the quantity of coal tendered for, and, in order to recoup himself for the commission so promised to Hunter, he inserted in the tenders prices which were in excess of the prices at which he would otherwise have tendered by 1*s.* per ton. Thereupon, Hunter being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. The coal was delivered to the plaintiffs under the contracts so obtained, and the total prices paid by the plaintiffs to the defendant under those contracts exceeded by a sum of 2329*l.* the prices which (but for the payment of the commission) the defendant would have received. Of the commission promised to Hunter the defendant paid him altogether about 1500*l.* During his tenure of office as the plaintiffs' manager Hunter received similar bribes from many other coal merchants, as well as the defendant, and those contractors, for the purpose of covering those bribes, inserted in their tenders and obtained from the plaintiffs prices in excess (by the amount of the bribes) of the prices which they would otherwise have received; but there was no evidence that the total amounts of the bribes paid to Hunter, or of the excess prices obtained by the various contractors (including the defendant), exceeded the sum of 10,000*l.*

On August 6, 1889, the plaintiffs, who had in the meantime discovered the frauds which had been committed upon them, and had commenced an action against Hunter in the Chancery Division (to which J. G. Hawkins, one of the contractors, was also made a defendant), to recover from him the amount of the bribes which he had received, entered into a written agreement with Hunter, the provisions of which are fully stated in the former report. (1) This agreement was not under the seal of the corporation.

The effect of the agreement was shortly this—that Hunter should assist the plaintiffs, by giving them the necessary information and evidence, to bring actions against the contractors (including the present defendant) to recover the bribes paid to him, or promised to him by the contractors. The actions were to be brought at his instance, and he was to pay the costs of

(1) 25 Q. B. D. at p. 365.

them. Hunter was to guarantee that the sums recovered in those actions should amount in the whole to 10,000*l.*, and, as a security for the performance of the guarantee, he was to deposit in a bank in joint names securities to the value of 10,000*l.*, and any sums recovered in the actions were to be taken in part satisfaction of the guarantee. At any time prior to December 31, 1889, the plaintiffs were at Hunter's request to discontinue the actions against the contractors, and thereupon the sum of 10,000*l.* was to be payable to the plaintiffs, together with such costs of the actions as they could not recover from any other person. On the receipt by the corporation of the 10,000*l.*, together with such costs and expenses, the corporation were to give Hunter a full and complete discharge, and in the meantime the action which they had commenced in the Chancery Division was to be stayed.

In pursuance of this agreement, Hunter lodged with the bank securities to the value of 10,000*l.* The corporation brought actions against some of the contractors (other than the present defendant) who had given bribes to Hunter, and thus recovered from those contractors sums amounting in the whole to 4000*l.* The plaintiffs commenced the present action against Lever on October 11, 1889, claiming to recover from him the sum of 2329*l.*, as damages for fraud in relation to contracts for the supply of coal by him to the plaintiffs; and, in the alternative, as money had and received by him to the plaintiffs' use. The defendant, in his defence, pleaded that, if he had paid any bribes to Hunter, Hunter had paid the same to the plaintiffs, or had accounted to or compounded with them in respect thereof, upon the terms that the plaintiffs should seek to recover, and should stand possessed of the moneys claimed in the action as trustees for and on behalf of Hunter.

The action was tried by Day, J., with a jury. The learned judge directed the jury that the agreement between the plaintiffs and Hunter had no bearing upon the relative rights of the plaintiffs and the defendant, and that they must find a verdict for the plaintiffs for the amount claimed.

The defendant moved for a new trial on the ground "that the judge misdirected the jury by telling them that there was no evidence which they could take into consideration with a view

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to reducing the amount of damages claimed, and upon the ground that the judge ought to have directed the jury to find whether (or to have held that) the plaintiffs had been paid by, or had compounded with their servant Hunter, and whether the action was being maintained for his benefit, and should, therefore, have entered judgment for the defendant, or should have directed the jury to take into consideration some or all of the above matters, or should otherwise have had regard to the agreement of August 6, 1889, between the plaintiffs and the said Samuel Hunter, with a view to the amount of the damages which the plaintiffs were entitled to recover."

The Divisional Court refused the motion.

The defendant appealed.

Oct. 30, 31. *Lawson Walton, Q.C.*, for the defendant. The learned judge misdirected the jury in not telling them that the release given by the person wronged to one of two joint tortfeasors operates as a release of the other also, and that acceptance of satisfaction from the one amounts to a receipt of satisfaction from the other, and is an answer to an action against him by the person wronged: Co. Litt. 232 a; *Brinsmead* v. *Harrison* (1); *Bird* v. *Randall* (2); *Cocke* v. *Jennor* (3); *Buckland* v. *Johnson*. (4) The corporation agreed to maintain their own cause of action against Lever and the other contractors, and to give Hunter the benefit of it. The proceeds of the litigation were to go to him. The effect of the agreement with Hunter was, to diminish the amount of the damages which the corporation could recover from Lever.

Henn Collins, Q.C., and *C. Gould*, for the plaintiffs. The plaintiffs were entitled to recover from Hunter, their agent, the bribes which he had received from Lever, and they had also a separate and independent right of action against Lever, or against him jointly with Hunter, to recover from Lever the excess of the price which they had paid to him above the price which he would have demanded, but for his agreement with Hunter to pay him the 1*s.* per ton.

A bribe received by an agent belongs ipso facto to his prin-

(1) Law Rep. 7 C. P. 547.
(2) 3 Burr. 1345.
(3) Hob. 66.
(4) 15 C. B. 145.

cipal; an action by the principal for money had and received to his use will lie in respect of it. But the principals can also sue the briber Lever for the 1*s.* per ton excess of price which they have paid him, and he cannot set off against their claim the bribe which he has paid to Hunter. This right of the principal against the agent is independent of his affirming or disaffirming the contract with the third party: *Parker* v. *M'Kenna* (1); *Emma Silver Mining Co.* v. *Grant* (2); *Bagnall* v. *Carlton.* (3) If the plaintiffs had brought their action against Lever before making any claim against Hunter, it would be no defence for Lever to say, "I bribed your agent." That would not amount to a plea of payment.

[LORD ESHER, M.R. If they received the money from Lever, could they go on and recover it again from Hunter?]

They could recover the same amount from him, but it would not be the same money.

[LINDLEY, L.J., referred to *Lister & Co.* v. *Stubbs.* (4)]

It must be immaterial whether the principal sues his agent or the third party first; the fraud gives him a right to recover something more than mere damages. If the plaintiffs had sued Hunter first, their right to sue Lever would have remained unaffected. Then the question arises, How does the agreement with Hunter affect their rights? It is submitted that it does not affect them at all. The law as to the effect of a release of one of two joint tortfeasors has no application. The rights of action arising out of the fraud are several and independent. If the fraud of the agent had damaged the principal to a greater extent than the amount of the bribe, the principal could sue him for damages, as well as for the amount of the bribe. If the agreement is ultrà vires, it cannot be a defence to the action. But the plaintiffs do not desire to take either this objection, or the objection that the agreement was not under seal. If the agreement is binding, it does not amount to either a release of Hunter or an accord and satisfaction; unless it amounts to one or other of these, it cannot be a defence to the action. A covenant not to sue one of two joint debtors does not operate as a release of the

(1) Law Rep. 10 Ch. 96, 118.
(2) 11 Ch. D. 918, 937.
(3) 6 Ch. D. 371.
(4) 45 Ch. D. 1.

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other: *Hutton* v. *Eyre* (1); à fortiori, a covenant not to sue one for a specified time cannot so operate. In this agreement there is not any express covenant not to sue Hunter. There is, at the most, an implied covenant not to sue him for a specified time. The assistance of Hunter was necessary to enable the plaintiffs to discover the fraudulent contractors, and the agreement amounts only to this, that if Hunter would, by depositing securities, guarantee that the plaintiffs should recover 10,000*l.*, they would for a specified time sue only the contractors. At the end of that time it would be open to them to sue him upon his guarantee. The contract is with one tortfeasor that the plaintiffs will (if they can) recover the money from the other, and, as consideration for this, he gives them security to the amount of 10,000*l.* Such an agreement is no defence to an action against the other tortfeasor.

Lawson Walton, Q.C., in reply. Lever was not the servant of the plaintiffs. He was really paying Hunter a part of his own profits. The action against him is for damages, which would not be liquidated until the verdict of the jury. A plaintiff who claims damages is bound to prove that he has suffered some loss. If he has been reimbursed in any way, he has suffered no loss. To the extent of what Hunter has paid them, the plaintiffs have been compensated for their loss, and cannot recover damages against Lever.

Cur. adv. vult.

Nov. 1. LORD ESHER, M.R. The Corporation of Salford have brought this action against the defendant, who is a coal merchant, and it is an action founded on fraud. What is the fraud which the defendant had committed? He had coals to sell, and he was obliged to make a bargain with the corporation through their agent, a man who, no doubt, would be known in Salford as having the power to make contracts for the corporation, and who, consequently, would be looked to by traders. The defendant knew that this man was the agent of the corporation, and that his duty was to buy coals for them at the price at which the defendant or some other trader was willing to sell them.

(1) 6 Taunt. 289.

The defendant was at liberty to sell the coals at any price he could get for them, not necessarily at the market price, but at the best price which he could obtain. He was bound, however, to act honestly. He offered this man Hunter to sell him coal at a price which would give him such a profit as he desired. But then Hunter tempted him by saying, "You want to sell your coals at a price which will give you a profit. I have the power of buying coals from you or from anybody else, and I will not buy them from you at the price at which you are willing to sell them, unless you will help me to cheat the corporation out of another shilling a ton. You are to have your price; but you are to add to it in the bills which you send to the corporation another shilling per ton, making the real price apparently a shilling per ton more; but that shilling is to be mine—you are to give it to me." They call this a commission, a term very well known, at all events in the North of England, and commissions sometimes cover a multitude of sins. In the present case it was meant to cover a fraud. The fraud was this, that the defendant allowed and assisted the agent of the corporation to put down a false figure as the price of the coals in order to cheat the corporation out of a shilling a ton, which was to be paid to their own agent; and the way in which it was done was this—the defendant sent in a bill to the corporation for the whole price thus increased. He got the advanced price into his hands, and as he got it by fraud he is bound to pay it back, unless something has happened to oust the right of the corporation. The damage to the corporation is clearly the 1*s.* per ton out of which they have been cheated, neither more nor less. The form of the action, on which some stress has been laid in the argument, is immaterial. Unless something has happened to oust the right of the corporation, they are entitled to sue the defendant for the 1*s.* a ton in one form of action or another, although he has parted with the money, and has handed it over to his confederate Hunter, because it was once in his hands, and he is liable for the fraud to which he was thus a party.

But the defendant says that something has happened which prevents the corporation from enforcing this right, and the first ground which was taken was this:—that this money which came

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into his hands passed into the hands of Hunter, the agent of the corporation, and they have recovered it, or part of it, from Hunter, and therefore cannot recover it from the defendant. This defence was advanced independently of, and without reference to, the agreement between the corporation and Hunter. On what ground have the corporation recovered the money from Hunter? Hunter, their agent, had received money from the defendant, for the performance of a duty which he was bound to perform without any such payment. Nothing could in law be more fraudulent, dangerous, or disgraceful, and therefore the law has struck at such conduct in this way. It says that, if an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to his principal whatever he has by reason of the fraud received beyond his due. It is a separate and distinct fraud on the agent. He might have received the money without any fraud of the person who was dealing with him. Suppose that person thought that the agent was entitled to a commission, he would not be fraudulent; but the agent would be, and it is because of his separate and distinct fraud that the law says he must give up the money to his principal. It signifies not what it may be called—whether damages or money had and received—the foundation of the claim of the principal is, that there is a separate and distinct fraud by his agent upon him, and therefore he is entitled to recover from the agent the sum which he has received. But does this prevent the principal from suing the third person also, if he has been fraudulent, because of his fraud? It has been settled that, if the principal brings an action against the third person first, he cannot set up the defence that the action cannot be maintained against him because the thing was done through the agent, and the principal was entitled to sue the agent. What difference can it make that the principal sues the third party secondly instead of first? The agent has been guilty of two distinct and independent frauds—the one in his character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or

the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received.

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But then the defendant says—and this is his second ground— that, even if this be so, the corporation have entered into an agreement with their agent Hunter which prevents them from suing the defendant in respect of the combined fraud of Hunter and himself. There is a well-settled rule that, if there are two joint tortfeasors, and the third person to whom the wrong has been done releases one of the two, he cannot afterwards sue the other. That is a well-known rule. Whether the rule goes further, and extends to an accord and satisfaction with one tort feasor, it is immaterial now to consider. Let us see what has been done. It is said that the corporation have entered into an agreement with Hunter. Though the corporation will not take the objection that the agreement is not under seal, I am not sure that the Court ought not to take it, seeing that the defendant has been guilty of a fraud. There is in fact no agreement at all which is binding on the corporation, because the alleged agreement does not bear their seal. First, then, there is no agreement; and, secondly, even supposing there is an agreement such as the defendant alleges, namely, that the corporation undertook to bring actions in the first instance against the third parties, at his request and at his expense, to recover the extra price which they had received, that would not, so far as I can see, be a compromise of a doubtful claim. It was an absolute agreement entered into by the officers of the corporation, and, if it were binding on the corporation, they bound themselves to bring the actions at the request of Hunter, and thus lost their independence as to whether those actions should proceed or not. If the actions failed, the corporation would be primarily liable for the costs to the persons against whom they were brought. It was true they were to get the costs from Hunter: but they would be primarily liable. They had given up their independence, and had bound themselves to bring the actions, whether they were likely to be successful or not. They had bound the ratepayers

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to pay the costs, in the first instance, if the actions failed, and to take the chance of Hunter paying them, and, supposing Hunter's securities proved insufficient, the ratepayers would lose these costs. Under these circumstances, speaking for myself alone, I am of opinion that the agreement was wholly ultrà vires the corporation. They had no mandate from the ratepayers to agree to it.

But, suppose that difficulty to be got over, what was the effect of the agreement? Was it a release of Hunter in respect of the combined fraud? Certainly it was not a release. It did not purport to be that. Moreover, it was not under seal, and it cannot therefore be dealt with as a release. And, when the terms of the agreement are looked at, it was clearly not a release of Hunter. It is perfectly true, as Mr. Henn Collins has pointed out, that the agreement merely suspended the action of the corporation against Hunter, and left it open to them to sue him afterwards, should circumstances arise in which they might think it right to do so. It was, in fact, nothing more than a postponement of their right of action, and that of itself cannot prevent them from suing Lever. Therefore, upon almost every ground upon which the case can be looked at, there is no defence to this action, and the defendant is liable. I know the result of it all may be this—that the corporation will recover their money from the defendant, and from other traders in a similar position against whom they may proceed, and that Hunter will have the benefit of it. Certainly the corporation cannot legally return to Hunter the money which they may thus recover. It belongs to the ratepayers, and the corporation have no possible right to pay it over to Hunter. But the result will be the same. These coal dealers, who were tempted by Hunter and persuaded by him to pay him the bribes, will be the sufferers. They may be ruined; and Hunter, when he comes out of prison, may find the securities, which are the result of his plunder and his gross frauds, untouched, and he may retain the whole of the money which he has received in this way. I am sorry for it; but such, in my opinion, is the law. It follows, therefore, that the defendant has no defence, and the judgment of the Divisional Court must remain, and the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion, and I will endeavour to express my reasons as shortly as possible. Looking at the case apart from the agreement, the action is really undefended. It is obvious that in some form of action the corporation have a right to recover this shilling a ton from the coal merchants. Under the old practice I think they could have recovered it by an action for money had and received; probably they could have recovered it in more ways than one. No one really disputes their right to recover the money independently of the agreement. The defence is based on the agreement between the corporation and Hunter. To understand the nature of that defence, we must look at the agreement, and place ourselves in the position of the parties to it. The corporation had discovered that they had been swindled out of 10,000*l.* at least, and probably more. They had prosecuted Hunter for his fraud; but they had not got their money back, and they were bound to get it back, if they could. Whether they could have recovered it from Hunter, I do not know. But it was clear that they could not get it back from the coal merchants without Hunter's assistance. In these circumstances, they came to this arrangement with Hunter, that he should deposit securities to the amount of 10,000*l.* in the joint names of the mayor and a solicitor. They said, "You must in that way put us in a position to recover 10,000*l.* in any event; and if you do this we will, at your cost, sue the coal merchants, and we will credit you with whatever we recover from them." That is in substance the effect of the agreement, and I am not prepared to say that under the circumstances it was an illegal bargain, or that it was ultrà vires the corporation. It is not easy to apply the doctrine of ultrà vires to the case; and, considering the scope and object of the agreement, it appears to me that it was neither illegal nor ultrà vires. It was not under the seal of the corporation, and was therefore not legally binding on them; but it has been treated as an agreement, or at any rate as a honourable understanding, binding as between Hunter and the corporation. What effect has it on the defendant's obligation? It appears to me that it has none whatever. The right of the corporation to recover from Hunter the bribe which Lever had paid him is clearly established, and *Bagnall* v. *Carlton* (1) shews

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that it would be no defence for Hunter to say that they had already recovered the same amount from Lever. It would be paradoxical if the rights of the corporation were to depend upon the accident which of the two wrongdoers they sued first. As to the argument that Lever would not be liable, if Hunter paid back the money, the right of the corporation to recover the bribes is clearly established; and I think it does not lie in the mouth of the defendant, who is a wrongdoer, to say that his liability to account to the corporation for the money received by him is to be determined by the circumstance whether they have already recovered from Hunter the money received by him. The corporation has a separate cause of action against each of them, and not one cause of action against both or either of them. No doubt, according to well-settled principles of law, if the plaintiffs had released Hunter from the demand to which he had become jointly and severally liable with Lever, that release would have enured to the benefit of Lever. But there is nothing of that kind in the agreement. Nor do I see any way in which the corporation's agreement with Hunter can be used by Lever as a defence, unless it can be brought to this—that the present action is, in reality though not in form, an action by one thief against another to recover part of the plunder. I have looked carefully at the agreement with a view to see if that is really so; but, when we consider that, so far as can be discovered, the corporation never could have got the 10,000*l.* from the contractors, unless this arrangement had been entered into,—when we look at the real facts of the case, I cannot say that the action is in form or in substance an action by one thief against another. It is an action by the defrauded principals against the man who has defrauded them, and bribed their agent, to recover for themselves what they can of the money of which they have been defrauded, although no doubt they have agreed with the agent to give him credit for what they may recover in the mode provided by the agreement. I think the decision of the Court below was correct.

LOPES, L.J. I will express no opinion as to whether the agreement was ultrà vires, nor as to whether it was illegal as against public morality; nor am I prepared to say that the

conduct of the corporation was improper in becoming parties to the agreement. All those matters—especially the first two—would require further consideration before I could decide in regard to them; and, moreover, in the present case it is unnecessary to decide any of them. I will deal with this case on the assumption that the agreement of August 6 was good and valid. If it be so, still it appears to me that the agreement has nothing whatever to do with this action which the corporation have brought against Lever; I do not even think that it was admissible in evidence by Lever against the corporation. It is not a release; it is not an accord and satisfaction; and therefore it cannot be pleaded as a defence by the co-tortfeasor. To my mind, that disposes of the agreement; and we must look at this action as if there were no agreement existing. Without the agreement, has the defendant any answer to the action? I think not. The rights of action by the corporation against him and Hunter are separate, distinct, and independent of each other. The right against Hunter is, to recover the secret bribe which he has received, and it is founded on his fraud in regard to that bribe. The right against Lever is, to recover the excess of price which he obtained through his fraud—a fraud, no doubt, in conjunction with Hunter, but an entirely separate and distinct fraud from that in respect of which the action against Hunter would be brought. It is said that these two actions cannot co-exist. I think that contention cannot be supported, and a very good illustration was given by Mr. Henn Collins, who said, "Suppose that instead of money a piece of plate had been given by Lever to Hunter; could it then be said that the corporation might not—having sued Hunter, their agent, who had secretly received the piece of plate, to recover the piece of plate—also maintain another action against Lever, who had given that bribe to Hunter?" Again, *Bagnall* v. *Carlton* (1) is an authority to shew that, if the action against Lever had been brought first, another action might have been afterwards brought by the corporation against Hunter; and it cannot for a moment, I think, be said that, because the action against Hunter was brought before the other, that in any way altered the rights

(1) 6 Ch. D. 371.

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of the parties. I think, therefore, that the decision of the Court below was right, and I agree with the judgment given by Denman and Charles, JJ.

Appeal dismissed.

Solicitors for plaintiffs: *Trass & Jarmain*, for *S. Brown, Salford.*

Solicitors for defendant: *Godfrey, Rhodes, Firth & Co.*, for *Godfrey, Rhodes, & Evans, Halifax.*

W. L. C.

Oct. 27, 28.

OVERSEERS OF PUTNEY *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Poor-rate—Deficiency in Assessments—Liability of Promoters of Undertaking—Lands Purchased in order to obtain withdrawal of Opposition of Owners to passing of Special Act—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 2, 133.

By the Lands Clauses Consolidation Act, 1845, s. 133: "If the promoters of the undertaking become possessed, by virtue of this or of the special Act, or any Act incorporated therewith, of any lands liable to be assessed to the poor-rate, they shall be liable to make good the deficiencies in the assessments to poor-rate by reason of such lands having been taken or used for the purposes of the works."

The promoters of a railway purchased houses beyond the limits of deviation from the line of the railway in order to obtain the withdrawal of the opposition of the owners of such houses to the passing of the special Act:—

Held, that the houses had been "taken for the purposes of the works" within the meaning of the section, and that the promoters were therefore liable to make good a consequent deficiency in the assessments of the houses to poor-rate.

SPECIAL CASE stated to ascertain whether or not the defendants, the London and South Western Railway Company, were liable under s. 133 (1) of the Lands Clauses Act, 1845, to make

(1) By s. 133 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18): "If the promoters of the undertaking become possessed by virtue of this or of the special Act, or any Act incorporated therewith, of any lands charged with the land-tax or liable to be assessed to the poor-rate, they shall from time to time, until the works shall be completed and assessed to such land-tax or poor-rate, be liable to make good the deficiencies in the several assessments for land-tax or poor-rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the special Act."

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good deficiencies in the assessments to poor-rate of certain houses in the parish of Putney, due, as the plaintiffs, the overseers, alleged, to the construction of the Fulham section of the Kingston and London Railway.

The construction of the line by the Kingston and London Railway Company had been authorized by an Act which came into operation in August, 1881. By an Act of 1882 deviations had been authorized, and the undertaking and the liabilities of the Kingston and London Railway Company had been transferred to the defendants and the Metropolitan District Railway Company jointly. Subsequently, by the London and South Western Railway Act, 1886, the undertaking and the liabilities of the two companies, so far as related to the Fulham section, vested in the defendants alone. In each of these Acts the Lands Clauses Act, 1845, was incorporated. The works were completed in July, 1889.

Some of the houses in respect of which the payment was claimed were within the limits of deviation, and had been compulsorily purchased by the defendants, either jointly or solely, and pulled down, in order to enable the section to be made. The defendants admitted their liability as regards such, but such only, of those houses as were occupied when possession of them was taken.

Of the other houses, none had been pulled down for the purposes of the works, and most were outside the limits of deviation. A small part of the garden of one was occupied by a viaduct, and in a pleasure-ground, which was attached to a number of the others, materials and plant had been placed for a time during the works. Most of these houses were purchased by the defendants jointly or solely in pursuance of agreements entered into between the owners and the promoters of the Kingston and London Railway, in consideration of the owners withdrawing their opposition to the Kingston and London Railway Act, 1881. One had been purchased compulsorily under the subsequent Acts. At the time of the passing of the Act many were unoccupied. The tenants of those which were then occupied for the most part left at the expiration of their tenancies. Some of these had remained unoccupied; others had been re-let by the

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defendants at lower rents and re-assessed by the plaintiffs. The defendants denied their liability in respect of all these houses.

In August, 1881, when the Kingston and London Railway Act came into operation, the houses, which were fifty-five in number, were assessed to the poor-rate at a rental of 342*l*. If the deficiency was to be reckoned from that date to July 1, 1889, the date of the completion of the works, it amounted to 229*l*. If it was to be reckoned from the dates of the completion of the purchases of freeholds by and the assignment of leaseholds to the defendants respectively to the date of the completion of the works, it amounted to 198*l*. It was stated that the plaintiffs were willing to accept the smaller sum.

Jelf, Q.C., and *Dryden*, for the plaintiffs. The defendants are liable to make good the deficiency to the full extent claimed. The houses in respect of which they dispute their liability are equally with those in respect of which they admit it, "lands liable to be assessed to the poor-rate," of which the company, whose liabilities they have taken over, became "possessed as promoters of the undertaking" within the meaning of s. 133 of the Lands Clauses Act. The houses in question were also "taken" if not "used" "for the purposes of the works" within the meaning of the section. The recitals in the deeds shew this, and if the houses were not acquired under their statutory powers, the defendants have acted ultrà vires in taking possession of them. [They referred to *Governor, &c. of Poor of City of Bristol* v. *Mayor, &c. of City and County of Bristol* (1); *Barnes* v. *Southsea Ry. Co.* (2)]

Balfour Browne, Q.C., and *Page*, for the defendants. The defendants are only liable under s. 133 to make good deficiencies specifically arising in respect of the "works" or "undertaking." These are defined in s. 2 to be "the works or undertaking which shall by the special act be authorized to be executed"—that is, in this case the Fulham section. The houses in respect of which the defendants dispute liability were purchased in order to buy off opposition to the passing of the special Act, not in any way for the purposes of the construction of this section.

(1) 18 Q. B. D. 549. (2) 27 Ch. D. 536.

They are distant from the line and in no sense part of "the works." [They referred to *Stratton* v. *Metropolitan Board of Works.* (1)]

Dryden, in reply.

DAY, J. I am of opinion that the plaintiffs are entitled to be paid by the defendants in respect of the deficiency in the assessment to poor-rate of the houses in question. I have felt great difficulty during the argument as to the true construction of the 133rd section of the Lands Clauses Act; but I think that, as regards the circumstances of this particular case, the plaintiffs have established their right to recover.

The defendants are "the promoters of the undertaking." They are "possessed" of the houses in the sense that they have purchased the property, and have in some instances accepted the attornment of the tenants at the time of the purchases, while in others they have themselves granted new leases. All the present occupiers of the houses are the defendants' tenants, and the defendants are in possession by them. Further, the defendants have obtained this possession "by virtue of the special act." They cannot say otherwise. They cannot allege that their possession is wrongful. Then there is no doubt that the lands are "liable to be assessed"; that if there is a deficiency in the assessments during the works, the defendants, because they are a railway company, are liable to make it good, and that such a deficiency has occurred. Had the purchaser of the property been a private person, and had the same depreciation in its value taken place under the same circumstances, the parish would have been without a remedy. But in the case of a railway company taking land under compulsory powers, the Lands Clauses Act provides that the company shall be "liable to make good the deficiencies in the several assessments to poor rate by reason of such lands having been taken or used for the purposes of the works." In this case, no doubt, the defendants have not constructed the railway upon the lands in question; but it is recited in the conveyances to them, and it must, I think, be taken as true, that they took the lands for the purposes of the works, though they may not have afterwards used them

(1) Law Rep. 10 C. P. 76.

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in the manner originally intended. The plaintiffs are, therefore, entitled to judgment. The deficiency is, in my opinion, properly estimated by a comparison between the rateable value of the property at the time of the passing of the special act and its rateable value at the time of the completion of the works. But as the plaintiffs only ask for the smaller sum, the judgment in their favour will be for that amount.

LAWRANCE, J. I am of the same opinion. I for a long time doubted whether these houses could be said to have been "taken" by the defendants "for the purposes of the works" within the meaning of s. 133 of the Lands Clauses Act; but on the whole I agree with my learned brother.

Judgment for the plaintiffs.

Solicitor for the plaintiffs: *W. Reeve.*
Solicitors for the defendants: *Bircham & Co.*

H. D. W.

Nov. 25.

MERTHYR TYDFIL LOCAL BOARD OF HEALTH, APPELLANTS; ASSESSMENT COMMITTEE OF THE MERTHYR TYDFIL UNION, RESPONDENTS.

Poor-rate — Waterworks — Rateable Value — Money advanced out of District Rate—Repayment—Statutory Restrictions—21 & 22 *Vict. c. xii.*

By the Merthyr Tydfil Water Act, 1858 (21 & 22 Vict. c. xii.), a local board of health was authorized to acquire waterworks, and by s. 63 all sums paid out of the general district rate under the Act were to be repaid out of any balance standing to the credit of the waterworks account, after application to the objects to which moneys carried to that account were, under the provisions of the Act, to be primarily applied, and by s. 71 all moneys received under the Act (other than money out of the district rate, or raised on mortgages, were to be applied, inter alia, in repaying any moneys advanced out of the general district rate under the powers and for the purposes of the Act. In assessing the local board to the poor-rate in respect of the waterworks, a sum paid out of the general district rate for the purposes of the Act was included in the rateable value of the waterworks:—

Held, that the sum ought not to be included in the assessment; for it was received on terms as to repayment which prevented it from being available as an item of gross profit.

SPECIAL CASE stated by order of Denman, J., under 12 & 13 Vict. c. 45, s. 11.

The appellants were the Urban Sanitary Authority for the District of Merthyr Tydfil, which comprises the parish of Merthyr Tydfil. The respondents were the Assessment Committee of the Merthyr Tydfil Union.

Under powers conferred by 21 & 22 Vict. c. xii. (Merthyr Tydfil Water Act, 1858) (1), the appellants constructed the Pentwyn Reservoir, partly in the parish of Llandetty and partly in the parish of Llanfigan, in the county of Brecon, and water mains were laid down to supply the Merthyr Tydfil local board district, which was wholly in the parish of Merthyr Tydfil and county of Glamorgan. The appellants also erected under the said powers a house, and constructed filtering beds in the parish of Merthyr Tydfil. In accordance with s. 61 of the Act, the whole of the money authorized to be borrowed by the Act had been raised and expended by the appellants upon permanent works sanctioned by the Act, part of the said money being borrowed upon the security of the general district rates of the appellants, and part thereof on the security of the water-rates and charges, but subject in both cases to the provisions as to reimbursement and otherwise contained in ss. 62 and 63 of the Act. The rates and charges at which water was to be supplied by the appellants for domestic purposes were set out in s. 47, which provided for the supply of water for the said purposes at rates not to exceed certain weekly payments or percentages

(1) By 21 & 22 Vict. c. xii. (Merthyr Tydfil Water Act, 1858), s. 63, as between the waterworks account and the general district rate, the water-rates and charges under this Act shall be primarily liable to be applied in satisfaction of all moneys borrowed under the powers of this Act, and the interest thereon, and in setting apart such sinking fund as aforesaid; and all sums paid out of the general district rate, under the powers or for the purposes of this Act, shall from time to time be reimbursed and repaid out of any balance from time to time standing to the credit of the waterworks account, after application to the objects to which moneys carried to that account are under the provisions of this Act to be 1stly, 2ndly, 3rdly, 4thly, and 5thly applied; . . . .

By s. 71, all moneys which shall be received by the local board under the powers of this Act (other than sums raised by the local board as part of the general district rates, and sums raised by the local board by mortgage), shall be applied as follows (that is to say) . . . . (6) in repaying any moneys advanced out of the general district rates under the powers or for the purposes of this Act, and not previously repaid.

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therein mentioned. The charges made for water supplied for the purposes mentioned were the maximum charges allowed by the section mentioned. The appellants were also authorized by s. 52 to supply water for other than domestic purposes (save and except for machinery or other motive power) for such remuneration and upon such other terms and conditions as might be agreed upon. The appellants supplied only a very small quantity of water for purposes other than domestic purposes within the meaning of the section last mentioned. In the year 1880 a valuation of the house, waterworks, mains, and filtering beds constructed within the parish of Merthyr Tydfil by the appellants under the powers conferred upon them by the Act was made on behalf of the respondents, and the gross estimated rental thereof was fixed at the sum of 3710*l.*, and the net rateable value at 2968*l.* This assessment had continued down to the present year.

The appellants having failed to obtain any relief from the assessment committee, appealed to the Court of Quarter Sessions against the poor-rates based on the valuation list. This special case was afterwards stated by consent.

By s. 60 of the Act the local board were to keep a separate and distinct account of all their receipts, credits, payments, and liabilities in and about the execution of the Act, and from or on account of the rates for water supplied under the Act, to be called "The Waterworks Account." From the account kept by the local board in conformity with the foregoing section, which was audited, printed, and circulated for the year ended March 25, 1889, it appeared that the total receipts of the appellants in respect of water-rates, rents, and charges for the year ended March 25, 1889, amounted to the sum of 5700*l.*, and that the total expenditure debited to the waterworks account was a sum of 14,107*l.* In order to balance the said accounts, a sum of 8404*l.* was transferred from the general district rate account. Neither the said 8404*l.*, nor any part thereof, was a receipt in respect of water-rates, rents, or charges, or of a rate in aid, nor was any part of the said sum applied towards the working expenses or the cost of maintaining the works mentioned; but it was applied partly to the payment of interest on

capital borrowed for the construction of the said waterworks, and in part to the payment of instalments on loans, as shewn by the account. The first item in the valuation prepared for the respondents, viz., that of 8424*l.*, was arrived at by subtracting from the said sum of 8404*l.* the amount expended in respect of instalment of loan, viz., the sum of 5680*l.*, and adding the balance of 2724*l.* to the said 5700*l.*, thereby making the total 8424*l.*, the amount which is alleged by the respondents to be necessary to pay working expenditure and interest on capital for the current year. The question for the opinion of the Court was: Which was the correct figure to adopt as the basis of calculation for estimating the rateable value of the said works—whether the said 5700*l.* only, or that amount supplemented by the said sum of 2724*l.*?

The appellants submitted that the water-rates and charges alone which were received by them formed the proper basis for estimating the rateable value of the undertaking, that they had no power to make up a deficiency in the receipts to meet the expenses, outgoings, and liabilities of the works constructed under the Act by a rate in aid or to levy a public water-rate. If the appellants had power to make up a deficiency in the receipts for the purpose mentioned, or to levy a rate in aid, or to levy a public water-rate, they had had no necessity so to do, nor had they done so. They further submitted that the respondents were not entitled to bring any part of the district rate into account in estimating the net rateable value of the house, waterworks, and filtering beds mentioned; inasmuch, as a hypothetical tenant could not draw upon the general district rate, or levy a rate in aid, and therefore could not have the benefit of such assistance.

The respondents contended that the water-rates and charges alone which were received by the appellants did not represent the value of the water supplied to the district, and did not therefore by themselves form a proper basis for estimating the rateable value of the undertaking; that a local board or a municipal corporation was on a different footing from that of a private company charged with the duty of supplying water to a particular district, inasmuch as such a company in obtaining

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parliamentary powers for such an object would take care that their scale of charges was such as to secure a fair return for capital invested after payment of all charges and expenses to which the concern was liable, while a local board might, for the purpose of giving the public a cheap water supply, be compelled to adopt a scale of water-rate which was insufficient to meet current outgoings and rent, any deficiency being made up by a rate in aid, or by contributions out of the general district rates; and that the hypothetical tenant who should take the waterworks, while subject to the same liabilities as the local board, would be entitled to the same advantages, amongst them being that of raising loans and paying the interest thereon out of the district rate.

If the Court was of opinion that the contention of the appellants was right, then the rate was to be amended and the rateable value of the entire undertaking of the appellants in all the parishes was to stand at 2624*l.* as the rateable value thereof, being the amount at which the same was valued for rating purposes by the appellants.

Balfour Browne, Q.C. (*William Lewis*, with him), for the appellants. The water-rates and charges alone form the proper basis for estimating the rateable value. The appellants exact the maximum rates, and no hypothetical tenant could get more. The restrictions under which he would have to take the premises must be regarded: *Corporation of Worcester* v. *Droitwich Assessment Committee*. (1) That decision was approved in *West Bromwich School Board* v. *Overseers of West Bromwich* (2), followed in *Mayor, &c., of Peterborough* v. *Stamford Union* (3), and not, in fact, modified by *Dewsbury and Heckmondwike Waterworks Board* v. *Assessment Committee of Penistone Union* (4), for in that case there was no repayment of the sum raised by the rate, whereas in the present case there is an obligation to repay. The true construction of 21 & 22 Vict. c. xii. (Methyr Tydfil Water Act, 1858), ss. 47, 60, 61, 62, 64, and 71 (6) is that all money received from the district rate must be paid back. The borrowed money ought

(1) 2 Ex. D. 49.
(2) 13 Q. B. D. 929.
(3) 31 W. R. 949.
(4) 16 Q. B. D. 585; 17 Q. B. D. 384.

not to be taken into consideration. It must be considered that no profit is derived from the premises.

Marshall, (*W. Baugh Allen*, with him), for the respondents. The repayment on which the appellants rely in order to distinguish this case from the *Dewsbury Case* (1), entirely depends on the future existence of a balance: s. 63. The district rate will get no relief until a profit is made. But there never can be a profit, as the only rate which can be made is to meet working expenses. There is no power to raise money to repay sums borrowed. In *Tyne Coal Co.* v. *Overseers of Wallsend Parish* (2), Grove, J., said: "You do not rate land in respect of its value being enhanced in respect of some possible future and contingent benefit, nor do you reduce its rateability in respect of some future and contingent loss, but you take only its present value." The *Droitwich Case* (3) was decided on the erroneous assumption that a profit had been made. The *Peterborough Case* (4) was disapproved of in the *West Bromwich Case.* (5) The fact that the premises are used for public purposes from which no profit can be made does not exempt from rateability: *Mersey Docks* v. *Cameron* and *Jones* v. *Mersey Docks* (6). Can it be said, as Manisty, J., asked in the *Dewsbury Case* (1), that there is imposed by the Act such a prohibition that there can be no beneficial occupation of the waterworks by any one? It is immaterial from what source the income is derived, so long as it is incidental to the ownership of the property.

[He also cited *Reg.* v. *Birstall Local Board.* (7)]

Balfour Browne, Q.C., in reply.

Cur. adv. vult.

1890. Nov. 25. The judgment of the Court (Stephen and Vaughan Williams, JJ.) was delivered by—

VAUGHAN WILLIAMS, J. The question in this case is whether or not a sum of 2724*l.* ought to be included in the receipts of the appellants for the purpose of calculating the net rateable value of the property. The answer to questions of this

(1) 16 Q. B. D. 585; 17 Q. B. D. 384.
(2) 46 L. J. (M.C.) 185.
(3) 2 Ex. D. 49.
(4) 31 W. R. 949.
(5) 13 Q. B. D. 929.
(6) 11 H. L. C. 443.
(7) 1 Times L. R. 541.

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MERTHYR TYDFIL LOCAL BOARD OF HEALTH v. ASSESSMENT COMMITTEE OF MERTHYR TYDFIL UNION.

Williams, J.

sort as to the rateable value of land occupied by corporations and companies for purposes of large undertakings for the service of the public is hardly ever of satisfactory character, having regard to the object of ascertaining the rateable value. It could hardly be expected to be so, seeing that the question in effect generally is: What is the proper conclusion to draw from given impossible hypothetical premises?

The sum 2724*l.* is a portion of a sum of 8404*l.* 6*s.* 8*d.* received by the appellants by transfer from the general district rate. Of the said sum 8404*l.* 6*s.* 8*d.*, 5680*l.* was expended in respect of instalment of loan, and the 2724*l.* is the balance of the 8404*l.* which was received by the appellants, and expended by them for purposes other than the instalment of loan. Now, if this sum of 2724*l.* is to be treated as part of the money received by the appellants for the supply of water, then it would seem properly included in the receipts for the purpose of calculation of rateable value: see *Dewsbury* v. *Assessment Committee of Penistone* (1); for if the 2724*l.* is received in payment for water supply, it is equally a receipt of money available as an item of gross profit in arriving at the profit or debit balance, whether the money is received from the hands of the consumer or by means of a rate in aid or by means of an unconditional transfer of money from the general district rate. The only essential is, the money so received should be money potentially available to the hypothetical tenant as an item of gross profits. It is because the 5680*l.* was not so available to the hypothetical tenant, being appropriated to the repayment of capital expenditure, and therefore received by the appellants not as hypothetical tenants but as landlords, that this sum is properly by common consent not included in the receipts of the hypothetical tenant for the purpose of arriving at the annual value. But although it may be conceded that when once money has been received or is receivable by the hypothetical tenant as such tenant, it must be included in the receipts for the purpose of the calculation of his anticipated profits, even though the profits when earned may be appropriated in the hands of the tenant to the liquidation of debts which are not his as hypothetical tenant, as was held in

(1) 16 Q. B. D. 585.

the *Dewsbury Case*, (1) yet the money must have been received by the tenant under conditions that make it potentially available to him as an item of gross profit. It is so available if the money is received as the price of water supplied, or as an unconditional aid augmenting the receipts of the tenant; but it is not so received if the tenant received the money on terms that he shall repay it, if he receives it in short by way of loan.

Now, do the appellants receive this money as they would money raised by a rate in aid, as an unconditional aid, or do they receive it by way of loan or otherwise on terms which render it not an item of gross profit? We are of opinion that, having regard to the terms of the 63rd section and the 71st of the Special Act of 1858, the money is received by appellants by way of loan, or at all events on terms which prevent it being an item of gross profit, and that it is not the less so received because the repayment is deferred and conditional on the happening of a contingency which may never happen, viz., the contingency of a balance standing to the credit of the waterworks account available for repayment of moneys advanced out of the general district rates in accordance with the 6th appropriation of s. 71. We think, therefore, that the contention of the appellants is right, and that the 2624*l.* should not be included as a receipt of the tenant for the purpose of arriving at the rateable value.

Judgment for appellants.

Solicitors for appellants: *Schultz & Son.*

Solicitors for respondents: *Wrentmore & Son.*

(1) 16 Q. B. D. 585.

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Nov. 10, 11, 12, 25.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* BARNARDO.

JONES'S CASE.

Practice—Appeals from Divisional Court—Habeas Corpus—Custody of Infant—Illegitimate Child—Rights of Mother of Illegitimate Child.

An appeal lies from an order of the Queen's Bench Division directing the issue of a writ of habeas corpus to bring before the Court an infant, in order to determine who is entitled to have the custody of and control over such infant.

In determining who is entitled to have the custody of and control over an illegitimate child the Court will, in a proper case, give the same effect to the mother's wishes in respect of the care, maintenance, and education of the child as it gives to the wishes of the father of a legitimate child in those respects.

APPEALS from two orders made by the Queen's Bench Division.

A rule nisi was obtained on behalf of Mrs. McHugh, the mother of an illegitimate child, John James Jones, calling upon Dr. Barnardo to shew cause why a writ of habeas corpus should not issue directing him to bring up the body of the child.

The circumstances of the application and the nature of the evidence are stated at length in the judgment of the Queen's Bench Division (post, pp. 195, 196).

1890. May 16, 17, and Aug. 5. *Finlay, Q.C.* (with him, *W. Baker*), shewed cause.

Murphy, Q.C. (with him, *Joseph Walton*, and *Forbes Lankester*), in support of the application.

Cur. adv. vult.

1890. Nov. 4. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.) was delivered by

LORD COLERIDGE, C.J. This is a case which has given us no little anxiety; not that the principles of law to be applied are either difficult or doubtful, but because the conduct of Dr. Barnardo himself has rendered their application a matter to us of very grave question. The facts, indeed, are few and simple, and, except on one point—a point, no doubt, of grave import-

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ance—are uncontradicted; while the law is too well settled to allow of much argument or controversy.

The applicant is the mother of an illegitimate child between eleven and twelve years old, whom she seeks by means of this application to take from the custody of the defendant, Dr. Barnardo, and to place in a Roman Catholic institution. She lived with the boy's father for more than twenty years, but left him some years ago, and was duly married to a man named McHugh, apparently a hard-working and respectable, but very poor man. She is now, at any rate, a Roman Catholic, and appears for many years to have belonged to the Roman Catholic Church, so far as she can be said to have belonged to any religious communion. The original reception of the young boy by Dr. Barnardo is open to no possible objection. It was with the mother's full consent. By an agreement of June 19, 1888, upon terms not material to be set out at length, the mother, who is described as the guardian of the boy, contracted that the boy should be given over to the custody and control of Dr. Barnardo for twelve years; while on the other hand it was provided that, if the managers of Dr. Barnardo's Home thought fit, the boy might at any time be sent back to his mother. It cannot be, nor is it suggested, that the mother's consent was anything but a perfectly willing one, or that she was cajoled or overpersuaded into giving it. She fully understood what she was doing, and she desired to do it.

For about sixteen months Mrs. McHugh, the mother, appears to have been contented to leave her boy where she had placed him, and she did not then, nor does she now, make any complaint as to his treatment. But early in November, 1889, she wished to communicate with him; and she was told by Dr. Barnardo that he had been sent into Huntingdonshire, and that, if she wished to write to him, she should send her letters to the office in Stepney, whence they would be forwarded to him. It is probable, from what appears in the subsequent correspondence, that in the meanwhile some persons of the Roman Catholic faith had persuaded Mrs. McHugh that it would be better to remove the boy from Dr. Barnardo's care, and have him brought up in a Roman Catholic school. However the change was brought

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about, Mrs. McHugh changed her mind, and she had a right to change it. She or her friends instructed her solicitors to claim her child; she gave them a written authority to claim the child; and she rescinded, so far as she could rescind, the contract of June 19, 1888. Dr. Barnardo, at the close of a correspondence to which it will be necessary to revert, refused to give up the boy, and hence the proceedings now before the Court.

On what grounds does Dr. Barnardo resist this application? Making every possible allowance for his annoyance at finding the boy, whom he had rescued from misery and had kept for eighteen months without charge to any one in comfort and content, suddenly claimed from him in order to be handed over to and brought up by a religious community to whose faith he had, as it would seem, the strongest objection, we are constrained to say that the course Dr. Barnardo took, and the letters which he wrote or caused to be written, were not to his credit. He seems to have forgotten that what he considered a good end did not justify the attempt to compass it by bad means, and that to write threatening letters to a mother asking for her child was not only certain to produce immediate failure, but must needs produce upon the mind of the Court, which had to exercise any discretion as to the custody of the child, an impression very disadvantageous to the writer of such letters. A letter written by his authority to Mrs. McHugh, on February 1, contains the following passages: "You are probably aware that before the Court will order him" (i.e., Dr. Barnardo) "to give up the boy, it will be necessary to satisfy the judges of the perfect respectability, sobriety, and morality of your own character and life, and that a close and searching inquiry will have to be made into your habits and mode of life extending over many years. I therefore write to place these facts before you, because it it possible that Messrs. Leathley & Phipson, the Roman Catholic solicitors, who have been for a long time making the most zealous efforts to remove several children from these institutions, may not have told you of the possible very unpleasant consequences to yourself which a searching inquiry into your private life and the public exposure of your habits in Court may lead to. Of course, it is very possible that you have nothing to fear from any

such inquiry: that you may be able to satisfy the Court that your life has been a perfectly pure and virtuous one; that your companions have been altogether good and respectable; and that you are yourself a sober and moral person; and that in every other way you are really fit to be the guardian of the child. If you can do this, it will undoubtedly influence the decision of the judges in your favour; but Dr. Barnardo feels it his duty, before you rush into the law courts without any proper object or complaint for doing so, to let you know what might, perhaps, be the result." In a letter of February 14 he gave the following reasons for refusing to give up the boy: "I have taken the greatest possible pains to examine into the antecedents of the mother, and to satisfy myself as to the real character she bears and has borne for years; as to the character and conduct of her present husband; as to their relations with each other; but especially as to the ill-treatment, the unnatural brutal ill-treatment, of the boy by the mother on whose behalf you write. I am not resting upon the statements of any one person; but you will find that the evidence I can adduce of long-continued neglect, cruelty, and even brutality, is vouched for by persons of unquestionable respectability and position. It was under these circumstances that I asked you in my last letter the question, why should a woman of such a type as Mrs. McHugh, who is the mother of an illegitimate child of eleven years of age, whom it can be proved she has subjected for years back to gross neglect, ill-treatment, and vile example—why should she, after having deliberately committed that child of her own willing consent to me, now be allowed capriciously to resume his charge or to transfer that child's custody to someone else? Strong as may be a mother's rights, swift as the law is to recognize these rights and to vindicate them, surely it cannot but be held that the child has rights also; and I know, from such examination as I have been able to give to the recorded cases, that the judges will be strongly disposed, in a case like this, to consider chiefly what is really for the best interests of the poor child. That child can be brought before the Court, and the judges can, and doubtless will, ask him concerning his treatment by his mother in days gone by, and can elicit the facts from his own lips. At any

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rate, my sense of responsibility in such a case is so grave and so serious, that, as I said the other day, I dare not permit that unfortunate child to be now 'handed over' to his mother, or to you on his mother's behalf, just as if he were a 'bale of goods,' without first of all bringing all the facts before the Court and obtaining its decision."

But the matter unhappily does not rest there; for from the date of the last letter Mrs. McHugh has been watched and followed—"shadowed" is the modern current word—by persons of both sexes in the employ and under the instructions of Dr. Barnardo, whom, although amateurs only, it is impossible to describe otherwise than as detectives. Where she went, with whom she consorted, how long she stayed in this public-house, how long in that, what she was seen to drink, how much more she may be presumed to have drunk, what she paid and what others paid for her —nay, what language she used, overheard when she did not know she was being watched through a door ajar, language which a lady was not ashamed to listen to and note down, though she professed to be ashamed to repeat it—all this, collected for months with indefatigable assiduity by Dr. Barnardo's friends, we have been compelled to listen to at great length, either from affidavits or oral evidence, in order to blacken the character of Mrs. McHugh and deprive her if possible of the control over her own child. This, too, when, whatever may be the antecedents of Mrs. McHugh, abundant security was offered to Dr. Barnardo that the child should be placed in respectable and responsible keeping, and should be well and carefully brought up. It is intolerable that inquisitorial proceedings of this kind should be set on foot in regard to the mother of a child by a person who has no legal right whatever to his custody, in order—for this is the plain fact —to prevent the child from falling under religious influences of which Dr. Barnardo disapproves. Against such practices the Court cannot but set its face, and declare further, that a person capable of them cannot be entrusted by the Court with the control of a child practically absolute and without effective supervision. It is right to add, that after a very careful and prolonged inquiry, after considering the various affidavits and hearing the examination and cross-examination of the witnesses, we are of

opinion that the attack on the character of Mrs. McHugh has broken down. Her life, it cannot be questioned, was for many years open to reproach, her habits are rough, her means of living are slender and precarious, and, if judged by an austere standard, she is certainly not the person one would select to take care of and to educate a boy of eleven or twelve years old. We have not, however, to select, and her moral shortcomings are, in our opinion, very far short of the point which would justify a Court in depriving her of the custody and control of her child, if she had it, and if the sole question before us were whether or no she was to be continued in the enjoyment of it.

This, then, brings us to the law applicable to the case, and to the mode in which we propose to apply it. Since the Judicature Act the duty of a court of law on such an application as the present is not so simple as it was before that Act was passed. If the duty were the same, we should be bound to follow, and should follow with entire approval, the principles stated in the judgment of the Court of Queen's Bench, consisting of Lord Campbell, C.J., Wightman and Crompton, JJ., delivered by Lord Campbell in *Reg.* v. *Clarke.* (1) It is difficult to add anything to the statement of the law in that admirable and exhaustive judgment. The judges there expressly held, that "the immorality to extinguish the right of the parent or guardian to the custody of the child must be of a gross nature, so that the child would be in serious danger of contamination by living with him" (2), and further that a mother, by committing a child to any one for the purpose of education, has not lost her right to retake him (3). This last position is as old as the Year Book (Mich. 8 Edw. IV., fol. 7, B. 2), and is treated as law by Lord Chief Baron Comyns and Sir John Patteson. (4) Two further considerations, however, arise in this case which were not and which could not be present to the mind of the Court in *Reg.* v. *Clarke.* (1) First, in that case the child was legitimate; in this case he is illegitimate. But on the present state of the authorities that makes no difference. The very point was decided by the Court of Appeal,

(1) 7 E. & B. 186.
(2) 7 E. & B. at p. 200.
(3) 7 E. & B., at p. 202.
(4) 7 E. & B. at pp. 193, 199.

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affirming the judgment of a Divisional Court in *Reg.* v. *Nash* (1), in which case Sir George Jessel treats, probably quite correctly, the astonishing question of Maule, J., in the case of *In re Lloyd* (2), "whether the mother of an illegitimate child was anything but a stranger to it," as having been asked in irony. Her rights had been recognized as far back as Sir James Mansfield in *Ex parte Knee* (3), and *Rex* v. *Soper* (4), and they cannot now be questioned. Next, we are bound now, whatever may have been the case in times past, to consider what is on the whole for the benefit of the child. We are to exercise that jurisdiction assumed by all the judges in *Reg.* v. *Nash* (1), and which Lord Eldon, in the case of *Wellesley* v. *Duke of Beaufort* (5), and Lord Cottenham in *Re Spence* (6), in terms asserted to have always existed in the Court of Chancery.

In order, so far as we could, to form a just judgment in a matter so important, we thought it right to examine the child himself, and we accordingly did so. We found him a very intelligent boy, well nurtured, well clothed, apparently healthy, and well taught, and perfectly happy and contented. He was desirous to stay where he is, but he had no dislike whatever to his mother; wished earnestly to see her from time to time, and denied altogether that she had been unkind to him, or had starved him, or within the limits of her power had neglected any of her duties to him. We at least found it impossible to talk to him without coming to the conclusion—first, that he was very happy and well-cared for at Dr. Barnardo's Home; and, secondly, that Dr. Barnardo's attack on the mother, and his scandalous charges against her in respect of unkindness to her boy, were without foundation. Under these circumstances, the course we ought to pursue both as matter of law and as matter of discretion, has given us much anxiety. We have said, that apart from the question of the mother's right, we should consider it undesirable to remove the child from a school where he is so well treated. On the other hand, we are strongly of opinion that Dr. Barnardo's conduct in this case, with which alone we are concerned, shews

(1) 10 Q. B. D. 454.
(2) 3 M. & G. 547.
(3) 1 B. & P. (N.R.) 148.
(4) 5 T. R. 278.
(5) 2 Russ. 1, at p. 21.
(6) 2 Phill. 247, at p. 252.

that he is unfit to have the uncontrolled and absolute power which he claims over Mrs. McHugh's child; and that Mrs McHugh is entitled to insist that her son should be withdrawn from his influence.

We were informed in the course of the argument that Mrs. McHugh was in a position to name as guardian for her boy a person of undoubted means and respectability, who would undertake to the Court that the boy in his charge should be as well taught and cared for as he has hitherto been. We thought it right before the vacation to inform the parties of the decision to which we had come, and our formal judgment was then delivered. We directed that the rule should be made absolute, with costs; but, in order that proper inquiries should be made as to the proposed guardian and the institution in which it was intended that the boy shall be placed, we directed that the writ of habeas corpus should lie in the office until the result of an application at chambers for the appointment of a guardian had been ascertained. We are informed that the matter has not been dealt with at chambers, and has been referred to the Court, and we shall be prepared to deal with it when it is brought before us.

Rule absolute.

H. D. W.

The Court subsequently made an order appointing as guardian of the child the person nominated by Mrs. McHugh.

Dr. Barnardo appealed from both the orders made by the Queen's Bench Division.

1890. Nov. 10, 11, 12. *Murphy, Q.C.* (*Joseph Walton*, and *Forbes Lankester*, with him), for the respondent. There is a preliminary objection to these appeals. No appeal lies from an order of the Queen's Bench Division directing the issue of a writ of habeas corpus: *Cox* v. *Hakes*. (1) The judgments of the House of Lords in that case are sufficiently wide in terms to cover this. With regard to the order appointing Mr. Walsh guardian of the child, the appellant, as a stranger, is not

(1) 15 App. Cas. 506.

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entitled to appeal. It is true that he had liberty to attend and make suggestions upon the application; but he did not thereby obtain a locus standi to appeal.

[He also referred to *In re Agar-Ellis, Agar-Ellis* v. *Lascelles.* (1)]

The appellant, in person, contended that an appeal would lie against both orders.

[LORD ESHER, M.R. We desire to hear the case argued upon the merits before expressing any opinion upon the point now raised.]

The appellant, in person. The mother of an illegitimate child has not all the rights of the father or mother of a legitimate child; she is not a guardian of the child by law, and may contract herself out of such right as she has. It may be that the father of a legitimate child cannot by contract divest himself of his character of guardian; but no such principle applies in the case of an illegitimate child. The Court will consider the interests of the child, and the question of religious education is one of those interests. It is contended that when an illegitimate child is past the age of nurture, and has been handed over by the mother under such an agreement as there was here to be brought up as a Protestant in a Protestant institution, and has been so brought up to the age of twelve years, it would be contrary to the interests of the child that the mother should be entitled to require it to be handed over to a rival religious institution in order that its religious faith may be changed; and there is no principle of law which compels the Court to give effect to the wishes of the mother in such a case. The wishes of the mother of an illegitimate child, at most, are only an element to be considered in deciding what is for the child's best interest.

[He cited *In re Ullee* (2); *Reg.* v. *Clarke* (3); *Rex* v. *Hopkins* (4); *Reg.* v. *Nash* (5); *In re Lloyd* (6); *Rex* v. *Soper* (7); *Rex* v. *Moseley* (8); *Stourton* v. *Stourton* (9); *Andrews* v. *Salt.* (10)]

(1) 24 Ch. D. 317.
(2) 53 L. T. R. (N.S.) 711; 54 L. T. R. (N.S.) 286.
(3) 7 E. & B. 186.
(4) 7 East, 579.
(5) 10 Q. B. D. 454.
(6) 3 M. & G. 547.
(7) 5 T. R. 278.
(8) 5 East, 224.
(9) 8 D. M. & G. 760.
(10) Law Rep. 8 Ch. 622.

Murphy, Q.C., and *Joseph Walton* (*Forbes Lankester*, with them), for the respondent. The right of the mother of an illegitimate child is, no doubt, not absolute; but she has a natural right over, coincident with a natural duty towards, the child; and the Court ought to give attention to her wishes in the absence of strong counterbalancing considerations. She is entitled to the custody of her child, and to say in what religious belief it shall be brought up, and she is entitled to change her mind in those respects, and go back from any agreement she has made, unless the effect will manifestly be to prejudice the interests of the child. In order to justify the Court in interfering with her action there must be a capricious interference on her part with what is clearly for the benefit of the child: *Lyons* v. *Blenkin*. (1) It is not sufficient that the mother was capricious in her action, or that she acted under the influence of others. The Court will not interfere unless the effect of her action is to prejudice the child. In the present case it is conceded that, so far as the guardianship of the child is concerned, the proposed change would not be prejudicial. The facts in *Lyons* v. *Blenkin* (1), and in *Andrews* v. *Salt* (2), distinguish those cases from the present. In *Lyons* v. *Blenkin* (1) the father, having allowed the children, until they approached maturity, to be brought up in a particular way by their aunt, desired to change their course of life and education, and Lord Eldon refused to remove them from the aunt's custody on the ground that it would be prejudicial to their interest so to do. So, in *Andrews* v. *Salt* (2), the Court refused to deliver the child into the custody of the father, because they thought that the happiness and prosperity of the child would thereby be likely to be affected. In the present case the Court below have exercised their discretion after careful inquiry into, and consideration of, all the facts, and this Court ought not to overrule that exercise of discretion in questions relating to the custody and guardianship of an infant unless a very strong case is made out. It is submitted that, having regard to the facts upon which the judgment of the Court below proceeded, no such case is made out here.

(1) Jacob's Reports, 245, per Lord Eldon, L.C., at p. 262.
(2) Law Rep. 8 Ch. 622.

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[They also referred to *Hawksworth* v. *Hawksworth* (1), and *In re Elderton*. (2)]

The appellant replied.

Cur. adv. vult.

1890. Nov. 25. LORD ESHER, M.R. The first question in this case is whether there is an appeal to this Court from the decision of the Divisional Court. It was argued that no appeal would lie, and that question was said to have been determined by the judgment of the House of Lords in the recent case of *Cox* v. *Hakes*. (3) The question before this Court arises with respect to the issue of a writ of habeas corpus to bring the case of an infant child before the Court, in order that the Court may determine whether the child shall remain in the custody of the person who now has the actual custody of him, or whether he shall be handed over to the custody of his mother, or to a person whom she nominates, and also whether this Court shall affirm the appointment of a guardian to the child. The writ of habeas corpus is a writ of procedure for the purpose of bringing some person into the presence of the Court or a judge, so that the Court or a judge may make an order with regard to that person. The procedure generally and originally has been used for the purpose of bringing up persons whose liberty was alleged to be actually interfered with; but the writ has also always been used with respect to the custody of infants, in order to determine whether the person who has the actual custody of them as children shall continue to have the custody of them as children. In such cases it is not a question of liberty, but of nurture, control, and education. The House of Lords have determined, with respect to the one set of cases in which the liberty of the person brought before the Court is in question, that no appeal lies against the order for the issue of a writ of habeas corpus. It is said that their decision went further, and determined that in no case of a writ of habeas corpus would an appeal lie. Having carefully read the judgments of the House of Lords, I have come to the conclusion that

(1) Law Rep. 6 Ch. 539. (2) 25 Ch. D. 220.
(3) 15 App. Cas. 506.

they did not go so far as that. They said that the words of s. 19 of the Judicature Act, 1873, were large enough to give an appeal; but when they came to consider the question of an appeal with respect to a case in which the writ was used for the purpose of determining whether a person should be deprived of his liberty, they came to the conclusion that there were great constitutional reasons against an appeal. They held, that in such a case there was no appeal, and pointed out that if the Court of Appeal differed from the conclusion arrived at by the judge who had granted a habeas corpus, the Court of Appeal would have no power to enforce its own conclusion. Those reasons do not apply here. The judgment of the House of Lords left open the case of a writ of habeas corpus used for the purpose of determining who should have the custody of an infant. I am of opinion that the judgment was not intended to take away, and did not take away, in such a case, the right of appeal given by s. 19 of the Judicature Act, 1873. This brings me to a consideration of the merits of the case, and I cannot deal with it without first of all reducing it to what, in my judgment, is the reality and truth of the matter. I do not believe that it is the case of a sensitive mother anxious to have her child under her own care and wounded by Dr. Barnardo's refusal to let her see it as often as she wished. We have here a perfectly well-known institution carried on with distinct objects. The first is to take neglected children out of the streets, and to take care of and educate them; and there is a second fundamental principle that they must be educated as Protestants. On the other side, we have a number of people, equally sincere and enthusiastic, who desire to bring up children as Roman Catholics. When I find that on the one side one of the greatest names in the city of London—that of Sir Robert Fowler—is brought forward, and it is said that he is willing to be nominated guardian of the child, and on the other side a person of equal respectability is willing to be so nominated, it becomes evident that this is not a dispute merely between Dr. Barnardo and the mother of the child. It is a dispute between two sets of earnest benevolent enthusiasts. The dispute is whether the child shall be brought up as a Roman Catholic or a Protestant. It is a dispute not over the

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body, but over the soul of the child. The child was practically on the streets. The mother was very poor and could not keep him off the streets, or properly clothed, or well-fed, though he was not starved. Under those circumstances, the mother deliberately, of her own free will, took the child to Dr. Barnardo, in order that it might be properly fed, clothed, and looked after. She knew perfectly well that it would be brought up as a Protestant, caring very little whether it was or not. It is a great part of Dr. Barnardo's business to take care of such children as this. All the money which he receives from benevolent people is spent first on the bodily welfare of the children. They are clothed, fed, and cared for, and they receive a religious education, though, I am glad to be assured, he does not, in the case of such young children, educate them with regard to the controversial points of difference between the two religions. The child was deliberately given up to him by its mother, and left with him for eighteen months. It was happy; it was properly clothed, fed, and cared for; nobody suggests that any harm could come to it from remaining under his care. But the mother has Roman Catholic relations. Her own religious belief is about as indifferent as it well can be. At one time she is a Protestant; at another, a Roman Catholic. Finally, after several changes, she becomes a Roman Catholic, and her relations persuade her to wish that the child should be removed from this Protestant institution. I come to the conclusion that, although she has no religious feeling of her own upon the matter, she has been persuaded that she wishes the child to be removed from Dr. Barnardo's Home. If I thought that she was not really persuaded at all—that she was really wholly indifferent to the child's interests—if I found that she had received money for giving her consent to this application—I should say that it was not made bonâ fide, and decline to accede to it. But I think that she really is persuaded that she wishes to remove the child. The idea is not to give the mother opportunities of seeing the child. It is not to be handed over to her, but to the other side. They cannot pretend that they will do better for the child than would be done for it if it remained in Dr. Barnardo's institution; but they propose on their part as guardian a person of equal

respectability with Sir Robert Fowler, and that person undertakes to look after it. It is clear, therefore, that whichever side succeeds the child is well provided for—far better provided for than he would have been if this dispute had never arisen. As to the law, the child is illegitimate. That fact makes a difference with respect to the position of the mother before the Court; but I am of opinion that it makes no difference whatever with respect to her right to the custody of the child. In this respect there is no difference whatever between the rights of the mother of an illegitimate child and the rights of the father or mother, if there is no father living, of a legitimate child. What are the rights of the mother of a legitimate child? It is her undoubted right, if there is no father living, to have the company and care of, and the control over, her own child. That is the law of England, founded on the law of nature. If that be the mother's right, it follows that, with regard to the actual care of and control over the child, she may nominate someone else to have the same right as she has herself to take care of and have the control over it. It cannot be denied that she may say to what school her child shall be sent, or that she may choose its tutors or governesses. She may say, "I wish the child to be placed under the care and control of this or that person," and, if there is no good reason to the contrary, the law will enforce her wish. In the present case the child is in the actual care of Dr. Barnardo, being there of the mother's own free will. More than that, she has by an agreement undertaken not to take the child away. The law is perfectly clear that parents cannot bind themselves by any such agreement. No such agreement can deprive a parent of the right of absolute control over his or her own child. This applies precisely to the mother of an illegitimate child. She cannot, by any agreement, absolve herself from the duty of taking care of it. The existence of the agreement is, therefore, immaterial. Then comes the question—the child being in the actual care of Dr. Barnardo, and the mother desiring to have it placed in the care of someone else—which of the two is it to be given to? The Court is bound to give effect to the wish of the mother, even though the child be illegitimate, unless there is some good reason to the

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contrary. Is there in this case any reason to the contrary? She did right, in my opinion, in giving up the child to Dr. Barnardo, being herself unable to take care of it. After leaving to him all the trouble and expense of taking care of it for eighteen months, she comes forward and says, "I want my child back." As I have said, it is idle to suppose that she wants it back in order to enjoy its company. The real truth is that she wants it to be brought up as a Roman Catholic. When Dr. Barnardo found that after all his trouble and expense, it was intended to remove the child to a rival institution carried on by Roman Catholics, his mind became full of suspicions. It was not unnatural, under those circumstances, that he should look closely into the matter, and that he should inquire into the position of the mother. He had her closely watched. I do not blame him for that; but I think that he did not appreciate the danger of employing agents who knew, or thought they knew, what he wanted—i.e., to find out that she was a disreputable woman. His agents accordingly made reports to him which, if true, would shew that she is now a disreputable woman. It would appear that she has not always been strictly reputable. It was shewn that for twenty years she lived with a man who was not her husband; but, considering the circumstances of her position and her poverty, I think she was more unfortunate than disreputable in that respect. The reports, however, have been carefully investigated by the learned judges of the Divisional Court, and they have come to the conclusion that Dr. Barnardo's agents have either been deceived or have exaggerated. We must, therefore, take it that she is not now a disreputable woman. In my opinion, the law puts Dr. Barnardo in the difficult position that, notwithstanding that he takes a child at the parent's request, and by agreement with him, and notwithstanding all the trouble and expense he has been at in respect of the child, he is bound, if the parent desires it, to yield the child up to him, unless Dr. Barnardo can shew to the Court some good reason to the contrary. It is not necessary now to decide whether, if the mother was a disreputable woman and desired to nominate some respectable person as guardian to the child, the Court would give effect to that wish. I am not, at any rate,

prepared to say that in that case she would be deprived of her natural rights. For the reasons which I have given, I am of opinion that there is nothing to entitle the Court to say that she should not be allowed to exercise her natural and legal rights with respect to her child. I think that this appeal should be dismissed. I will only add, that I do not agree with the strictures upon the conduct of Dr. Barnardo which were made in the Divisional Court.

The following judgment was read by

LINDLEY, L.J. Two questions are raised by this appeal. (1.) Does an appeal lie? (2.) If it does, ought the orders appealed from to be confirmed or reversed? The orders appealed from are two: (1.) an order that a writ of habeas corpus do issue directing Dr. Barnardo to bring up an infant named Jones or Roddy; (2.) an order appointing a Mr. Walsh guardian of the infant. There is not yet any order for the delivery of the infant to him; but if this appeal fails, such an order will forthwith be made as a matter of course. That an appeal lies against the second of these orders is too clear for serious controversy. Such orders were always made in Chancery before the passing of the Judicature Acts; they were always appealable. The appeal section of the Judicature Act, 1873—viz., s. 19—plainly includes orders of this description. Whether in form the appeal should be brought by Dr. Barnardo as it in fact is, or whether it should be brought by the infant by a next friend, who might be Dr. Barnardo, is a matter of no real importance. The latter form is, I think, the more correct; but as the order has been served on Dr. Barnardo, and is a preliminary step towards removing the child from his custody, and as, moreover, the order directs him to pay the costs of the application, I am not prepared to say that his appeal is technically wrong in point of form. Even if it were, the Court would not hesitate to allow it to be amended, and I pass from this subject without further comment. But then it is said that no appeal lies from the order directing a writ of habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox* v. *Hakes*. (1) That decision, however, appears to me to have

(1) 15 App. Cas. 506.

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no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child. It is true that proceedings by habeas corpus may be had recourse to for the purpose of settling both questions; but the proper custody of an infant is by no means finally settled by habeas corpus. The Court of Chancery has asserted its powers to restrain a father from applying for a habeas corpus in order to recover possession of a child from a properly appointed guardian ("M'Pherson on Infants," p. 149); and in *Andrews* v. *Salt* (1) the Court restrained a testamentary guardian, who had applied for a habeas corpus to obtain possession of an infant in the custody of her mother, from interfering with the custody or education of the infant. The jurisdiction of the Court of Chancery to control legal rights of custody enforceable at law by habeas corpus was never disputed, so far as I am aware. On the other hand, the Court had no jurisdiction to restrain a person from seeking to obtain his freedom by that well-known writ. The Judicature Acts have put an end to injunctions to restrain legal proceedings, and as regards infants it is expressly enacted by s. 25 (10) of the Judicature Act, 1873, that "in questions relating to the custody and education of infants the rules of equity shall prevail." It certainly would be a strange state of things if, since the Judicature Acts, there should be an appeal from an order as to the custody of an infant if made on summons, and no appeal from a similar order if made on habeas corpus, even although the two orders were wholly inconsistent with each other. It is true that there was no appeal from an order on habeas corpus before the Judicature Acts; but s. 19 of the Act of 1873 gives such an appeal, so far as words are concerned, and I can discover no reason for cutting them down in a case of this sort. These reasons, as well as a careful study of the judgments of the House of Lords in *Cox* v. *Hakes* (2), lead me to the conclusion that the decision in that case has no application to such cases as that with which the Court has now to deal. I am of opinion that it is competent for this Court to entertain the appeal from the order on habeas corpus as well as from the order on the summons, which is the more important of the two. Passing

(1) Law Rep. 8 Ch. 622. (2) 15 App. Cas. 506.

now to the merits of the case. The child is illegitimate. The consequence is that he has no guardian: *Re Ullee.* (1) In other words, there is no person who has all the rights of a guardian over either him or his property. But, although this is true, it is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a primâ facie right to the custody of the child up to the age of fourteen in preference either to the reputed father or to any other person: *Reg.* v. *Nash.* (2) This right is based on the relationship which exists between a mother and her child, and on the absence of all superior right on the part of the reputed father or of any one else. This right of the mother is no doubt subject to control by the High Court, and if in any case it be proved that a mother is unfit to have the custody of her own illegitimate child, the Court clearly has jurisdiction to remove the child from her control. The power of the Court of Chancery to deprive a father of the custody of his own legitimate child in a proper case is undoubted; and the power of the High Court over the mother of an illegitimate child is certainly not less extensive. The power of the Court to control the mother is, in truth, indisputable and not disputed. But the Court will not interfere with her arbitrarily, and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse so to do. Taking this view of the mother's rights and of the duty of the Court, I see no reason why a mother should not from time to time change her mind as to where, how, or by whom her child shall be brought up, nor why the Court should interfere with her or refuse to support her, unless circumstances be proved which satisfy the Court that its duty to the infant requires it to act contrary to her wishes. The circumstances relied upon by the appellant to shew that the mother's wishes ought not to prevail are as follows: (1.) The mother's immoral and dissolute character. The worst charges against her were, however, disproved in the opinion of the Divisional Court, and must be taken as not established. The fact that she lived with a man without being married to him is not of itself sufficient to deprive her of her rights. (2.) The want of bona fides on the part of the mother, who is alleged to be a mere instrument in the

(1) 53 L. T. (N.S.) 711. (2) 10 Q. B. D. 454.

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hands of others. There can be no doubt that she is supported in this controversy by Roman Catholic priests; but the evidence is strong that she went to them for help, and that they did not first go to her; and, although it would be ridiculous to suppose that she is not under priestly influence, I cannot come to the conclusion that she does not really desire to have her child removed from his present custodians. (3.) The abandonment by her of her right to the child. That even the father of a legitimate child may abandon his right to educate his child as he thinks proper is established by *Andrews* v. *Salt* (1); but it is extremely difficult to define the conduct which amounts to such an abandonment. A mere agreement with a stranger that he shall have the child for a definite time will not, although acted upon, necessarily amount to such an abandonment. But if it can be shewn that it would be an injury to the child not to abide by such an agreement, this additional circumstance may turn the scale. It is necessary to consider this point, viz., (4.) the injury which would accrue to this child if it were removed to a Roman Catholic school. Dr. Barnardo has educated the child as a Protestant. But, considering the age of the child and the short time he has had any religious instructions, I cannot think that he has yet arrived at that stage in his religious education at which a change of education will be injurious to him. So far as I can judge, no injury will be done to him whether he remains where he is or whether he is removed to some Roman Catholic institution. He will be as well cared for in the one place as in the other, and his wishes are not strongly one way or the other. Nor is it the duty of the Court to insist that he shall be brought up in the Protestant rather than in the Roman Catholic religion against the wishes of the mother. I have now passed in review the various grounds relied upon by the appellant for leaving the child with him, and I have given my reasons for holding them to be insufficient. Being insufficient, I am of opinion that the law requires that the mother's wishes must prevail. I will only add that I am not surprised that Dr. Barnardo should feel annoyed at finding his efforts thwarted, as they occasionally are, by persons who do not awake to their own duties to their children until he

(1) Law Rep. 8 Ch. 622.

has rescued them from degradation and ruin. But the duty of this Court is to ascertain and maintain rights and to administer the law with absolute indifference to every other consideration; and whilst I regret that such a contest as this should ever have arisen, yet, having arisen, it is my duty to say that the law is on the side of the mother, and that the appeal must be dismissed with costs.

The following judgment was read by

LOPES, L.J. It was contended that no appeal would lie in this case, and reliance was placed upon the case of *Cox* v. *Hakes* (1). That case establishes that there is no appeal under s. 19 of the Judicature Act, 1873, from an order of the High Court discharging a prisoner from custody under a writ of habeas corpus. It is said that the decision is not confined to discharges from custody, but is applicable to all illegal detentions, and includes a case like the present, where no question of the personal freedom of the infant arises, but a change of custody is sought from one who has the custody to another who claims to be entitled to it. To determine this it is necessary carefully to consider the judgments in the *Cox* v. *Hakes* (1), and the reasoning upon which those judgments are founded. I feel that it is somewhat anomalous to hold that one order made under a writ of habeas corpus is an order within the meaning of the word "order" used in s. 19 of the Judicature Act, 1873, and that another order is not. The words of the statute are: "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice, or any judges or judge thereof." Lord Bramwell says that he has a misgiving whether, in awarding or disposing of a writ of habeas corpus, a judge of the High Court, in the High Court itself, is acting as a Court or a judge of a Court of Judicature. The ground, however, of the judgments in the *Cox* v. *Hakes* (1) is that, there being no power to recapture or re-arrest, an appeal after an order of discharge from custody would be useless; consequently, that the right way of dealing with the word "order"

(1) 15 App. Cas. 506.

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in s. 19 is to limit its meaning to cases where the Court of Appeal, or the Court appealed from, can execute the order or judgment of the Court if required. The passages I am about to read from Lord Bramwell's and Lord Herschell's judgments make this clear. Lord Bramwell says: "If an order of discharge is a judgment or order of Judicature, and so within the very words of s. 19, a limitation must be put upon them, excluding such appeals, to avoid the futility, inconvenience, and incongruity which would otherwise result." Lord Herschell says: "I am driven, then, to the conclusion that, where a person has been discharged by the High Court under a writ of habeas corpus, the Court of Appeal has no power effectually to interfere with the action of the Court below. The judgment of the higher Court cannot in any way affect the discharge or restore to custody the person liberated. It is incompetent to give effect to its judgment, and cannot undo what it holds to have been wrongly done by the order appealed from. I think it is impossible to read the section to be construed without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ from the Court below, were intended to be co-extensive." It is clear, therefore, that what the House of Lords decided was that, in the case of a discharge from custody under a writ of habeas corpus, there is no appeal, because the Court cannot give effect to its order. This reasoning is inapplicable to the case now under consideration. There has been no discharge of the infant. The infant is within the control of the Court, and the Court can make what order it thinks fit with regard to his custody, and can give full effect to its order or judgment. I come to the conclusion, therefore, that there is an appeal in this case, and that this case is not governed by the *Cox* v. *Hakes*. (1) Indeed, it seems to me that the appeal is sanctioned by the reasoning in that case. With regard to the merits of the case, I cannot help saying that I doubt much if the mother of the child would have wished to remove him if she had not been influenced by others. I believe the desire to remove the child emanates from others, and not

(1) 15 App. Cas. 506.

from herself. She placed the child in Dr. Barnardo's institution in the first instance of her own free will. She entered voluntarily into an agreement, by which the child was to be left there for several years; and she, in fact, left the child there without any interference for more than a year. The child, it is to be observed, was happy and desirous to be left with Dr. Barnardo. The child's reputed father had the same desire. I doubt if the contemplated change into a different atmosphere, with new and different surroundings, will be for the welfare of the child. It is, however, a matter of discretion. The Court below has seen and examined the witnesses and carefully considered the case. In such circumstances the exercise of the discretion is not lightly to be set aside, and for this reason, and this reason only, I do not dissent from the judgments delivered. On Dr. Barnardo severe strictures have been passed in the Court below. I do not entirely agree with what has been said. Doubtless he is over-zealous, often misguided, and too prone to resist the law; but, at any rate, I believe his motives are benevolent and philanthropic.

Appeal dismissed.

Solicitors for appellant: *H. C. Nisbet & Daw.*
Solicitors for respondent: *Leathley & Phipson.*

W. A.

C. A.
1890
Dec. 8.

[IN THE COURT OF APPEAL.]

DE PASS *v.* THE CAPITAL AND INDUSTRIES CORPORATION, LIMITED. F. J. VINALL, GARNISHEE.

Practice—Garnishee Order—Affidavit in support of Application—Information and belief of Deponent—Allegation of particular Debt being Due—Inquiry as to other Debts—Order XLV., *r.* 1.

On an application for a garnishee order the affidavit in support stated, on information and belief, that a particular debt was due from the garnishee to the judgment debtor. The garnishee, by affidavit, denied the existence of that specific debt:—

Held, that on such an application an affidavit of information and belief is sufficient.

Held, also, that in such a case the inquiry is not limited to the existence of the particular debt alleged, and consequently that the garnishee might be called upon to depose that he did not owe any debt to the judgment debtor, and that, on his refusal to do so, an order absolute could rightly be made.

Coren v. *Barne* (22 Q. B. D. 249) approved.

APPEAL by the plaintiff, a judgment creditor, against an order of a Divisional Court (Day and Lawrance, JJ.) rescinding a garnishee order absolute made at chambers.

The plaintiff having recovered a judgment in the action for 148*l.*, which remained unpaid, obtained a garnishee order against the garnishee Vinall, on an affidavit by the plaintiff's solicitor, in which he stated that he had been informed by the managing director of the defendant company, and verily believed, that Vinall owed a sum of 100*l.* and upwards for calls due in respect of 300 shares held by him in the defendant company. In shewing cause, the garnishee made an affidavit to this effect: "I have paid to the Capital and Industries Corporation, Limited, all sums payable by me in respect of the 300 shares held by me in the corporation, save and except such sums as are still uncalled on such shares, which sums I am advised I am not liable to pay until a call is properly made."

The master required the garnishee to make an affidavit that he did not owe any debt to the judgment debtors; but he declined to do so, and contended that the affidavit filed on behalf of the judgment creditor was insufficient, being only of information

and belief. The master referred the matter to a judge, who affirmed the view of the master, and made an order that the garnishee should pay the amount of the judgment debt, and that in default execution might issue. On appeal to the Divisional Court this order was set aside.

The judgment creditor appealed.

1890. Dec. 1. *Winch, Q.C.*, and *Clavell Salter*, in support of the appeal. An affidavit which deposes to information and belief of the existence of a debt due to the judgment debtor is sufficient ground for the garnishee order: *Coren* v. *Barne*. (1) In the majority of cases a judgment creditor can only have hearsay evidence of such a debt, and cannot know the facts of his own knowledge. Then, when the garnishee order nisi is made, it attaches all debts owing or accruing due from the garnishee. If cause is shewn against such an order, it is competent for the master or judge to inquire whether any debt is owing to the judgment debtor. [They cited *Lucy* v. *Wood*. (2)]

Gainsford Bruce, Q.C., and *Beddall*, for the garnishee. The affidavit in support of the order for an attachment of a debt must allege the existence of a debt, and information and belief is not sufficient: Order XLV., r. 1; *Gilbert* v. *Endean* (3)

[Lord Esher, M.R. Such a rule would prevent the great majority of applications, for in ninety-nine cases out of a hundred the judgment creditor could not swear to the existence of such a debt to his own knowledge.]

The garnishee can only be called on to answer a definite allegation in the affidavit, and he cannot be asked to make a general affidavit that no debt is owing by him to the judgment debtor, for to oblige him to do so would shift the onus of proof on to the wrong person. The form of the order nisi is that the garnishee shall attend on the application of the judgment creditor that the garnishee "pay the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment:" Form 39, App. K. That means the debt previously sworn to in the affidavit.

(1) 22 Q. B. D. 249. (2) W. N. (1884) 58.

(3) 9 Ch. D. 259.

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[The case was adjourned to give the garnishee an opportunity to offer himself for oral examination as to the existence of any debt; but he declined to do so.]

1890. Dec. 8. LORD ESHER, M.R. This was an application for an order to attach certain debts, and it came before a judge at chambers to be determined. We are called on, as it seems to me, to say whether on such an application the Court or a judge should go into the substance of the application or should be bound by technicalities founded on the words of the order. The order regulating attachment of debts is Order XLV. Under that order, on an ex parte application, and on an affidavit that any other person is indebted to the judgment debtor, an order may be made that "all debts owing or accruing from such person (hereinafter called the garnishee) to such debtor shall be attached to answer such judgment or order." Then, by the same or a subsequent order, the garnishee may be called on to shew cause why he should not pay to the person who has obtained the judgment or order "the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order." On this it is argued that if the affidavit describes a particular debt as due from the garnishee it is sufficient for him to shew cause why he should not pay that debt, and that the inquiry is confined to that particular matter. The simple answer to this is that no debt need be described in the affidavit, and that all that the deponent is required to do is to swear to some debt. In the case before us, the person who made the affidavit went further than he need have gone, and inserted an unnecessary description of a particular debt said to be due. In the affidavit in answer, the garnishee swore that he did not owe any money to the defendant company for unpaid calls. By so doing he took issue on the immaterial part of the allegation, and passed by the rest of it. He does not allege that he owes nothing to the company, but that he is not indebted in respect of those particular calls. In this state of things the judge at chambers gave the garnishee an opportunity of answering the material part of the allegation—that is, the question whether any debt was due; but no advantage was taken of this offer. When

a person who can and ought to answer a question declines to do so the natural inference is that he knows that his answer will not benefit his case. The view of the learned judge—it is, if I may say so, the common sense view—was that the garnishee was unable to say that he did not owe the company money, and that if he did owe them money, whether this was for unpaid calls or on some other account, was immaterial. I entirely agree in this view; for there is nothing, as it seems to me, to confine the inquiry to the question of a debt for unpaid calls, or to tie the judge at chambers down to the question whether that particular debt was due. What he had to do was to get at the substance of the thing and see whether the garnishee was indebted to the judgment debtor or not. On the appeal to this Court we thought it right to give the garnishee another opportunity of saying that he did not owe the company any money, but he has not availed himself of it. It is impossible under these circumstances to draw any other inference than that drawn by the learned judge, namely, that there was such a debt. Consequently the order made was right, and should not have been set aside by the Divisional Court. The appeal will, therefore, succeed.

Lopes, L.J. I think the order of the learned judge at chambers was right. The proceedings were in this wise. There was an ex parte application under Order xlv. accompanied by an affidavit. The form for such an affidavit is No. 25 in Appendix B to the rules, and it states the judgment, that it is unsatisfied and that the garnishee is indebted to the judgment debtor "in the sum of pounds or thereabouts." Notwithstanding the form of this affidavit, it appears by *Lucy* v. *Wood* (1) that a garnishee order nisi will be made, although the amount of the debt sought to be attached is not stated. The affidavit was in the form given in the appendix, but additional words were inserted to the effect that the debt was for unpaid calls. An order to attach all debts due from the garnishee to the judgment debtor was made, together with the usual order that the garnishee should shew cause why he should not pay. He made an affidavit that he was not indebted to the company for unpaid

(1) W. N. (1884) 58.

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calls, and the judge at chambers gave him an opportunity of supplementing this and swearing that he was not indebted to the company at all. That offer was declined, and on that the judge drew the natural inference that the money was in fact owing, and made an order accordingly that it should be paid. I think he was quite right. The matter does not rest there; for when the appeal came before this Court we gave the garnishee another opportunity of saying that he was not indebted to the company, and this he has again declined. The inference is irresistible that he could not answer that no such debt was owing. I think, therefore, the order was quite right, and that the reversal of it by the Divisional Court cannot be supported.

KAY, L.J. In this case we have before us the judgment creditor and the garnishee, and it is not suggested that the interests of any other person are affected. The first objection taken on behalf of the garnishee is, that the affidavit in support of the application is only an affidavit of information and belief as to there being a debt due from the garnishee to the judgment debtor. I do not understand how any one can be asked to swear to the existence of such a debt except in this way. The objection which has been dealt with in *Coren* v. *Barne* (1) is untenable. The next point is that the debt is said to be in respect of calls due on shares held by the garnishee, and it is urged that the garnishee need only negative the existence of that debt. I think the course taken by the learned judge in refusing to limit the inquiry to such a debt was right, and I agree that the only inference to be drawn from the fact that the garnishee declined before the judge, and again in this Court to say that he owes no debt is that he does owe some debt. Whether this is in respect of calls or not I am not quite satisfied; but I am satisfied that there is a debt and that the order was right.

Appeal allowed.

Solicitors for plaintiff: *Angrove & Bromwich.*
Solicitors for the garnishee: *Taylor & Taylor.*

(1) 22 Q. B. D. 249.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1890
Dec. 15, 19.

JONES *v.* MACAULAY.

Practice—Counter-claim—Default of Pleading—Judgment, Motion for—Order XXVII., *r.* 11.

Where the plaintiff fails to deliver a defence to a counter-claim, the defendant cannot sign judgment on the counter-claim for default of pleading, but must move for judgment under Order XXVII., r. 11.

APPEAL from an order of the Queen's Bench Division (Stephen and Charles, JJ.), refusing leave to sign judgment for default in pleading. The facts were as follows. The action was for the price of goods sold and delivered. The defendant pleaded a defence, and also counter-claimed for medical attendance an amount less than the claim. The plaintiff did not reply to the counter-claim. The defendant thereupon applied at the office to sign judgment on the counter-claim, but was not allowed to do so on the ground that the proper procedure was to move for judgment. An application was then made to a judge at chambers ex parte, that the defendant might be allowed to sign judgment by default on the counter-claim, but was refused. The defendant appealed to the Divisional Court, who affirmed the decision of the judge. The defendant now moved ex parte by way of appeal from the Divisional Court.

1890. Dec. 15. *Cluer*, for the defendant. For this purpose a counter-claim is a cross-action, and the same practice applies as in the case of default in pleading to a claim: Order XXIII., r. 4. It is said that Order XXVII., r. 11, applies, and therefore the proper procedure is for the defendant to move for judgment; but that can only be by reading the word "plaintiff" in that rule as including a defendant who has counter-claimed. But, if so, why are not the previous rules of the same order to be read in the same way? If they are so read, then a defendant who counter-claims for a liquidated demand is within Order XXVII., r. 2, and may sign judgment for default of pleading. [He cited

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Order XXXII., r. 6: *MacGowan* v. *Middleton* (1); *Higgins* v. *Scott* (2); *Burkhardt* v. *Im Thurm.* (3)]

Cur. adv. vult.

1890. Dec. 19. LORD ESHER, M.R. In this case the question was raised, whether, where there was no pleading by way of defence to a counter-claim, the defendant could sign judgment on the counter-claim without moving for judgment. This is a question of practice which depends on the construction of the rules. I do not propose to discuss at length the language of the rules which bear on the subject; but, after considering them, it appears to me that there is nothing in the rules so clearly contrary to the practice which has been established for a long time, and which was followed in *Burkhardt* v. *Im Thurm* (3) and *Higgins* v. *Scott* (2), as to compel us to overrule that practice, which is in my opinion a good and convenient one. For these reasons I think this application should be refused.

LOPES, L.J. I am of the same opinion. I think that the provisions of the rules are in accordance with the decision of the Court below. The case turns on Orders XXIII. and XXVII. Order XXVII., r. 11, is, in my opinion, the rule which is applicable to it. That rule provides that "in all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to." It seems to me that this case comes within those words. It was argued that the case was governed by Order XXIII., r. 4, which provides that, where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence. In my opinion that rule has nothing to do with the present case. It is important to look at the headings of these orders. The heading to Order XXIII. is "Reply and subsequent pleadings," and it is obvious that it is intended to apply where the action proceeds in the ordinary course with regard to pleadings. Order XXVII.

(1) 11 Q. B. D. 464. (2) 21 Q. B. D. 10.

(3) Not reported, but cited in Annual Practice for 1890, p. 496.

is headed "Default of pleading." That, therefore, is the order which provides for default of pleading, and in it is contained rule 11, which provides what is to be done in all other cases than those previously dealt with in the order where there is a default of pleading. I agree that the decision in *Higgins* v. *Scott* (1) was correct and in accordance with the rules. There is a good reason why the practice should be so. Suppose a plaintiff claimed 500*l.*, and there was a counter-claim for 100*l.* to which the plaintiff did not plead. If the defendant were entitled to sign judgment on the counter-claim, he could issue execution for the 100*l.* while the action against him for 500*l.* was still pending. I think that it was intended by the rules to prevent this and to reserve to the Court control over the matter; and with this object it was provided, not that the defendant should be able to sign judgment in a case of this sort, but that he must come to the Court, which should make such order as might be just under the circumstances.

KAY, L.J. I entirely agree. It appears to me that the practice as laid down in *Higgins* v. *Scott* (1) is quite consistent with the rules; and I agree with Lopes, L.J., as to the inconvenience of adopting a practice which would enable the defendant to sign judgment on the counter-claim, and issue execution on such judgment while the action was pending, without applying to the Court.

Appeal dismissed.

Solicitors for defendant: *Hood Barrs & Meadows.*

(1) 21 Q. B. D. 10.

E. L.

C. A.
1890
Dec. 1, 19.

[IN THE COURT OF APPEAL.]

HECKSCHER *v.* CROSLEY AND ANOTHER.

Practice—Security for Costs—New Trial, Motion for—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 1; *Order* LVIII., *r.* 15.

An order for security for the costs of a motion for a new trial entered in the Court of Appeal under the Supreme Court of Judicature Act, 1890, being applied for on the ground of the poverty of the party moving:—

Held, that, inasmuch as it was not the practice in the Queen's Bench Division to order security for costs to be given in such cases before the Act, the Court of Appeal would not make such order.

APPLICATION by the defendants that the plaintiff might be ordered to give security for the costs of a motion by him for a new trial of the action.

The action had been tried with a jury, and the motion for a new trial had been entered in the Court of Appeal under the Supreme Court of Judicature Act, 1890, s. 1.

The ground of the application was that, from the plaintiff's want of means, costs could not be recovered from him if the motion was unsuccessful.

J. G. Witt, for the defendants, contended that a motion for a new trial under the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, and the Rule of August, 1890, made in pursuance thereof, was an appeal within Order LVIII., r. 15, and, therefore, the Court had power to order security for costs to be given in such a case.

R. T. Reid, Q.C., and *J. E. Raven* (*J. W. Baines*, with them), for the plaintiff, were not called upon.

THE COURT (Lord Esher, M.R., Lopes, L.J., and Kay, L.J.) were of opinion that in the particular case the affidavits did not sufficiently shew plaintiff's want of means, and therefore there was no ground for ordering security for costs to be given, assuming that they had power to do so; but they intimated that they would on a subsequent occasion state their opinion on the general question, whether security for costs could be ordered to be given in such cases.

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1890. Dec. 19. LORD ESHER, M.R. An application was made to us to order the plaintiff in this case to give security for the costs of a motion for a new trial on the ground that, through poverty, he would be unable to pay such costs if unsuccessful. We are of opinion that we ought to deal with these motions for new trials, which now come before us in the first instance, under the Supreme Court of Judicature Act, 1890, as nearly as possible as they were dealt with by the Divisional Court, when the motion for a new trial was made there in the first instance. As a general rule no security for costs was required to be given by a party moving for a new trial in the Divisional Court, and we think that we ought not to alter the practice in that respect, now that the application comes before us in the first instance.

LOPES, L.J., and KAY, L.J., concurred.

Application refused.

Solicitors for plaintiff: *Cole & Higson.*

Solicitors for defendants: *Crosley & Burn.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.

Dec. 4.

EDWARDS *v.* MARSTON.

Bill of Sale—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), *s.* 9—*Statutory form—Equal Monthly Payments for Interest.*

A bill of sale, dated September 26, 1887, after witnessing that the mortgagor, in consideration of 50*l.*, assigned to the mortgagee the scheduled chattels by way of security for the payment of the sum of 50*l.* and interest thereon at the rate of 5 per cent. per month, proceeded as follows: "And the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid with the interest then due as follows: The sum of 2*l.* 10*s.* on October 26, 1887, and the like sum of 2*l.* 10*s.* on the 26th of each and every succeeding month thereafter until September 26, 1889; then the balance and interest as aforesaid is to be paid":—

Held, that the scheme of the bill of sale clearly was that the principal sum of 50*l.* should be repaid at the end of two years, and that the sum of 2*l.* 10*s.* should be paid monthly as interest at the rate of 5 per cent. per month in the meantime; and that so construed the bill of sale was in accordance with the form given in the schedule to the Bills of Sale Act, 1882.

Goldstrom v. *Tallerman* (18 Q. B. D. 1) discussed.

APPEAL of defendant from the judgment of Charles, J., at the trial without a jury.

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The action was for conversion of goods, and was brought by the holder of a bill of sale over the goods against a person who had purchased them from the grantor subsequently to the execution of the bill of sale. The question was whether the bill of sale was good. Its terms, so far as material, were as follows. It was dated September 26, 1887. After witnessing that the mortgagor, in consideration of 50*l.*, assigned to the mortgagee the chattels described in the schedule annexed by way of security for the payment of the sum of 50*l.* and interest thereon at the rate of 5 per cent. per month, it proceeded, "and the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid with the interest then due as follows: The sum of 2*l.* 10*s.* on October 26, 1887, and the like sum of 2*l.* 10*s.* on the 26th of each and every succeeding month thereafter until September 26, 1889; then the balance and interest as aforesaid is to be paid." It was contended that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882. Charles, J., held the bill of sale good, and gave judgment for the plaintiff.

J. Alderson Foote, for the defendant. This bill of sale is not in accordance with the statutory form. The true rate of interest is really not stated. The bill of sale, down to the words "with the interest then due as follows," follows the statutory form. That form has received judicial construction. It was held by this Court in *Goldstrom* v. *Tallerman* (1) that the meaning of these words in the statutory form is that the equal instalments or payments are to be of principal; for it was said there by Fry, L.J., in giving the judgment, that the words "together with the interest then due" are parenthetic, and that the word "then" is used in anticipation of the dates for payment thereafter given; so that in fact the words may be properly transposed and placed after the stipulation for payment of principal, and the whole sentence would then run thus: "He will duly pay the principal sum aforesaid by equal ——— payments on the —th day of ———, together with the interest due at the respective times of payment of instalments of the principal." Reading this bill of

(1) 18 Q. B. D. 1, at pp. 4, 5.

sale in accordance with that judgment, and treating the monthly payments of 2*l.* 10*s.* as principal, they come to more than the amount of the principal debt. It would be a deviation from the form to make the grantor pay more than the true principal debt. Whether the monthly payments are principal or interest, on neither hypothesis can the terms of the bill of sale be satisfied. It cannot be that the payments of 2*l.* 10*s.* are all interest; because then how could there be a "balance" after the monthly payments had been made? In such case the whole of the principal debt would remain due. If the monthly payments are principal, then, so far from any balance being due, more than the amount of the debt would have been paid.

In any case the effect of this bill of sale is ambiguous and obscure, and calculated to perplex a reader; for it leaves it doubtful whether the monthly payments are principal or interest; and it is not therefore in accordance with the statutory form, the object of which is that the provisions as to payment should be clear and intelligible, so that the debtor and those who are concerned may know the debtor's exact position and the rate of interest.

[He also cited *Haslewood* v. *Consolidated Credit Company* (1); *Davis* v. *Burton.* (2)]

Cock, Q.C., and *Crispe*, for the plaintiff, were not called upon.

LORD ESHER, M.R. The question is whether this bill of sale is void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. The bill of sale consists partly of a printed form, and, so far as the printed words are concerned, they follow precisely the words of the form in the schedule. The form in the schedule runs thus: "And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal ——— payments of ——— *l.*, on the ——— day of ———." Then there is an alternative given by the words in italics within brackets ["*or whatever else may be the stipulated times or time of payment*"]. So that the payment need not be by equal payments, as described in the former words. It may be

(1) 25 Q. B. D. 555. (2) 11 Q. B. D. 537.

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as stipulated. This bill of sale follows the words of the statute until it comes to the time of payment, and then proceeds: "The sum of 2*l.* 10*s.* on the 26th October, 1887, and the like sum of 2*l.* 10*s.* on the 26th of each and every succeeding month thereafter, until the 26th September, 1889; then the balance and interest is to be paid." It seems to me that this bill of sale is exactly in accordance with the terms of the form. If the form is filled up according to the instructions given in the brackets, then the bill of sale is exactly in accordance with the form, whatever may be the construction to be put upon it. I do not believe, and I am prepared to deny, that the expressions used by Fry, L.J., in giving the judgment of the Court in the case of *Goldstrom* v. *Tallerman* (1), have the meaning that has been attributed to them in argument. They were phrases applicable to the case before the Court at the time, and expressed the meaning of the form as applied to that case. They were not a general description of the effect which the form was intended to produce in all cases. Charles, J., seems to have thought that the monthly payments of 2*l.* 10*s.* were meant to include some part of the principal sum of 50*l.*, but that on that footing, as the bill of sale followed the form, it was good. I confess that I do not agree with the learned judge so far as his interpretation of the document is concerned. It seems to me that the meaning is clearly this: that there is to be a loan of 50*l.*, and that no part of the principal is to be paid until the end of two years, interest at the rate of 5 per cent. per month being in the meantime paid. The monthly payments of 2*l.* 10*s.*, when added up, do not correspond with the principal sum lent, but they exactly correspond with the interest at the specified rate of 5 per cent. per month. If that was the meaning of the parties and it is clearly indicated by the document, it would be very unreasonable that there should be anything in the form to prevent the parties from making such an arrangement. It appears to me that the necessary implication from the terms of the document is that such was the agreement, and that the document is exactly in accordance with the form. For these reasons I think that the judgment is right, and that this appeal should be dismissed.

(1) 18 Q. B. D. 1.

LOPES, L.J. I agree. I think that this bill of sale is in accordance with the form. The true construction of the bill of sale appears to me to be that the agreement was for a loan of the sum of 50*l.* for a period of two years, with interest at the rate of 5 per cent. per month. In my opinion the bill of sale plainly expresses that agreement, and I cannot think that any one would construe it otherwise, seeing that the monthly payments exactly correspond with the amount of interest mentioned. The case of *Goldstrom* v. *Tallerman* (1) was an altogether different case. There the amount of the instalment to be paid each month did not correspond with the amount of the interest.

KAY, L.J. The bill of sale is expressed to be given to secure the amount of 50*l.* and interest at the rate of 5 per cent. per month. Then follows the provision for payment, which is in these terms: "The said mortgagor doth further agree and declare that he will duly pay to the said mortgagee the principal sum aforesaid, together with the interest then due, as follows: The sum of 2*l.* 10*s.* on the 26th October, 1887, and the like sum of 2*l.* 10*s.* on the 26th of each and every succeeding month thereafter, until the 26th September, 1889; then the balance and interest is to be paid." Every word that I have read is exactly in accordance with the form, except the words, "then the balance, &c.," which are not actually in the form. The main point which arises for consideration is, what the monthly payments of 2*l.* 10*s.* represent. Are they principal, or both interest and principal, or interest only? The sum of 2*l.* 10*s.* is the exact amount of the monthly interest; and I think that any one reading the document could not doubt that it represented interest only. Then, if so, what is the meaning of the other words, "then the balance, with interest as aforesaid, is to be paid"? On the last of the specified days there would be the amount of 50*l.* and one month's interest to be paid. The words appear to me to indicate that amount. Why is not that a perfectly intelligible provision? Why should not the principal due be called the balance? The bill of sale is to secure two things, the principal and the interest. If the interest

(1) 18 Q. B D. 1.

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has all been paid, the principal might be called the balance. I cannot conceive that the use of that term should occasion any difficulty in construing the provision in accordance with what was obviously the arrangement contemplated. It was argued that we were bound to treat the payments of 2*l.* 10*s.* per month as payments on account of principal; and that the case of *Goldstrom* v. *Tallerman* (1) had laid down a hard and fast rule that the form must be construed as meaning, when it says that "A. B. will duly pay to C. D. the principal sum aforesaid, together with the interest then due, by equal payments," that the equal payments must be of principal only. I cannot think that that was the meaning of the judgment in *Goldstrom* v. *Tallerman*. (1) For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Hicks & Arnold.*

Solicitors for defendant: *Prior, Church, & Adams, for Dickinson & Prior.*

E. L.

C. A. *Dec.* 18.

[IN THE COURT OF APPEAL.]

MADELL *v.* THOMAS & CO.

Bill of Sale—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 3—*Absolute Assignment of Chattels—Hiring Agreement—Substance of Transaction to be looked at, notwithstanding Form—Estoppel.*

The plaintiff executed a deed, by which he assigned chattels absolutely to the defendants, and a hiring agreement, by which he hired the chattels from the defendants. These documents did not represent the real transaction between the parties, their intention being merely to create a security for money. The documents were not registered as required by the Bills of Sale Acts. The defendants having seized the goods for breach of the conditions of the hiring agreement, the plaintiff brought an action against them in respect of such seizure:—

Held, that the Court must disregard the form and look to the true nature of the transaction; that the documents amounted to a bill of sale within the Bills of Sale Act, 1882, and were void for want of registration; and that the plaintiff, therefore, was entitled to maintain the action.

In re Watson (25 Q. B. D. 27) followed.

APPLICATION by the defendants to set aside verdict for the plaintiff given by the jury at the trial before A. L. Smith, J.,

(1) 18 Q. B. D. 1.

and judgment entered thereon, and to enter judgment for defendants or for a new trial.

The facts were as follows. The defendants were woollen warehousemen. The plaintiff had executed a deed by which, after reciting that he was indebted to the defendants for goods sold and delivered to the amount of 150*l.*, and that he had applied to them for a further advance of 50*l.*, and to accept payment of the 150*l.* in manner thereinafter appearing, it was witnessed that, in consideration of forbearance to sue in respect of the 150*l.* and of the sum of 50*l.* paid, the plaintiff assigned the chattels specified in the schedule thereto to the defendants, to hold to them absolutely. On the same date, the plaintiff executed a hiring agreement, whereby he agreed to hire the chattels "upon the terms and conditions following, viz., on the sum of 200*l.* being paid to the defendants in forty instalments of 5*l.* each, the first to be paid on December 31, 1888, and each subsequent instalment on each succeeding Monday, the said effects to belong, without further payment, to the plaintiff; in case of default in punctual payment of any instalment, or in case the said effects should be removed without the consent in writing of the defendants, or in case the hirer should become bankrupt or go into liquidation or compound with his creditors, the instalments previously paid to be forfeited to the defendants, who should be entitled to resume possession of the goods, the understanding being that, until full payment of the said sum of 200*l.*, the said effects remain the sole and absolute property of the defendants, and are only lent on hire to the hirer." The plaintiff's contention was that the documents amounted to a bill of sale within the Bills of Sale Act, 1882, and, being unregistered, were void. Evidence was given on both sides as to what took place between the parties during the negotiations which ended in the execution of the above-mentioned documents. The learned judge in substance told the jury to consider whether the transaction was an out-and-out sale of the chattels to the defendants, followed by a hiring of them from the defendants by the plaintiff, or that there should be a mere security for a loan under the disguise or cloak of an assignment followed by a hiring, in which latter case they must find for the plaintiff. The jury found for the plaintiff, and

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the learned judge thereupon entered judgment for the plaintiff for the damages found by the jury.

Channell, Q.C., and *C. C. Scott*, for the defendants. Under the Bills of Sale Act, 1878, an unregistered bill of sale is only avoided in favour of a trustee in bankruptcy or an execution creditor; and the Bills of Sale Act, 1882, only relates to bills of sale given by way of security for money: *Swift* v. *Pannell.* (1) In this case the deed assigns the goods absolutely. The plaintiff is estopped by his own deed from saying that the assignment of these goods was by way of security only. The case is distinguishable from *In re Watson.* (2) There the question arose as between the trustee in bankruptcy of the grantor and the grantee, and the Bills of Sale Acts are intended to put trustees in bankruptcy and execution creditors in a better position than the bankrupt or execution debtor. Moreover, in *In re Watson* (2), there was no question of an assignment by deed. The supposed transfer of the property was by an act of symbolical delivery, and there was nothing contrary to the law of evidence in going into evidence to explain the true intention with which such a delivery was made. It would be contrary to all principle to allow the plaintiff to adduce parol evidence to contradict and avoid the effect of his own deed. The case of *Bowes* v. *Foster* (3) shews the distinction in this respect between an assignment by deed which actually transfers the property and such documents as a fictitious invoice or a receipt for money which has been paid. [They also cited *Doe* v. *Roberts* (4); *Bessey* v. *Windham* (5); *Phillpotts* v. *Phillpotts.* (6)]

J. A. Boyle McConnell, for the plaintiff, was not called upon.

LORD ESHER, M.R. I think that this application fails. This case seems to me to come exactly within the principle laid down in the case of *In re Watson.* (2) In that case we had to consider the true construction of the Bills of Sale Acts, and whether those Acts did not oblige the Court to do, with regard to certain documents, that which but for those Acts they might have no power

(1) 24 Ch. D. 210.
(2) 25 Q. B. D. 27.
(3) 2 H. & N. 779.
(4) 2 B. & Ald. 367.
(5) 6 Q. B. 166.
(6) 10 C. B. 85.

to do, viz., to go behind the document and ascertain the true nature of the transaction between the parties. The object of the legislature in those Acts has been to protect borrowers against lenders as well as to protect other persons who might be creditors of borrowers. The main object of the Act of 1882 is to protect borrowers as against lenders. When we look at the Act we find that it deals with documents that certainly are not, in the ordinary meaning which they bear, and which but for the Act could not be disputed by the parties, bills of sale; and the necessary implication arises that documents, which are in the ordinary meaning of language on the face of them not bills of sale, shall, nevertheless, be bills of sale within the meaning of the Act, if certain facts exist which do not appear on the face of the document. It follows that the Court must have greater power with regard to the effect to be given to such documents under the Act than they would have apart from the Act. Suppose there was an agreement in writing not under seal by which certain rights were given over personal property, but which on its face would not be a bill of sale within the terms of the Act apart from any question under the Act. Apart from the Act, no evidence could be given of any other intention than that which appeared from the agreement itself. But it is in my opinion obvious that it was intended by the Act, that, though such might be the form of the agreement, the Court should go into the question whether the agreement was not in reality given by way of security for money lent. In my judgment in the case of *In re Watson* (1), the question which we thought to arise and intended to decide was stated to be "whether it was a true proposition to say that, where the parties have given the transaction, for the purpose of disguising its real nature, a form which is not that of a bill of sale, the Court is precluded from deciding the case according to the real truth and substance of the matter by means of the form so put forward by way of disguise and for the purpose of preventing the Court from getting at the true facts"; and I said that "the Court ought not to let a sham document, drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the truth of the matter." I

(1) 25 Q. B. D. 27.

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further said, "I do not deny that people may evade an Act of Parliament if they can; but, if they attempt to do so by putting forward documents which appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth." This language appears to me to be exactly applicable to the present case. There are passages in the judgment of Cotton, L.J., to the same effect. He said: "The county court judge finds in effect that the sale and hiring was a sham and a mere pretence, and that the real transaction was that Love advanced money by way of loan, and was to be secured by the agreement. That being so, the hiring agreement was a mere pretence"; and further on he says: "There is no case in my opinion which decides that the Court is bound by the form of the agreement." The judgment of Lindley, L.J., is to the same effect. He said: "If the conclusion is arrived at that the hiring agreement was a real letting out of goods by the real owner of them, then it is not a bill of sale; but if, as in this case, the supposed hirer is the real owner of the goods, then it has at least the effect of a licence to seize the goods of the borrower of the money as a security for the loan. It seems to me that the true principle is that in these cases the Court must look at the real transaction."

These statements of the law were not confined to documents which could be contradicted by parol evidence. They deal with documents which, but for the Act, could not be contradicted, and lay down the principle that, for the purpose of seeing whether the Act applies, the Court is to look through or behind the documents, and to get at the reality; and, if in reality the documents are only given as a security for money, then they are bills of sale. It is true that in *In re Watson* (1) the contest was between a trustee in bankruptcy and the grantee of the bill of sale; but it seems to me that the legal effect is precisely the same as if it had been between the immediate parties to the document. A trustee in bankruptcy takes in such a case the same rights as the bankrupt had. The judgment in that case turned on the construction of the provisions of the Bills of Sale Acts. If it

(1) 25 Q. B. D. 27.

applies to this case, as I think it does, then the result is that the Court has a right to go through these documents and get at the truth of the transaction. That can only be done by receiving evidence as to what was the real intention of the parties in executing the documents. In considering the question, however, the form of the document is not to be excluded; it must be considered as well as the other evidence. It appears to me that the case was rightly left to the jury, and that their finding upon the evidence before them was reasonable.

LOPES, L.J. I agree. I think that the case is governed by the decision in *In re Watson*. (1) The effect of that decision was, that in regard to the application of the Bills of Sale Acts the Court must go through the form of the documents, and ascertain the true nature of the transaction between the parties. The Master of the Rolls cited a portion of his judgment in that case. I will refer to another portion of it, where he said: "The document itself must be looked at as part of the evidence; but it is only part; and the Court must look at the other facts, and ascertain the actual truth of the case. Here it is found as a fact that there was no real transaction of sale; that there was nothing but a loan accompanied by a security given upon the goods, the terms of which are contained in the document in question. That being so, the form of the document does not prevent our looking at the real truth of the case, which is that the document is not really a hiring agreement, but in substance contains the terms of a loan and the security given for it upon personal chattels." Every word of what I have read appears to me to apply to the present case; and in my opinion, independently of *In re Watson* (1), there is abundance of authority to the same effect. The defendants' counsel, as I understood him, admitted that, if the plaintiff had been a trustee in bankruptcy or execution creditor, then the decision in *In re Watson* (1) would apply; but he drew the distinction that this case arose between the immediate parties to the documents, and argued that the plaintiff was estopped from setting up the true nature of the transaction on the ground that he would thereby be contradicting the

(1) 25 Q. B. D. 27.

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Lopes, L J.

terms of his own deed. I do not think that there is any sound distinction between the cases, or that the doctrine of estoppel applies in this case any more than it did in that. The trustee in bankruptcy was there really claiming through the grantor of the bill of sale, and the doctrine of estoppel, when applicable, applies to a privy as well as a party. The Bills of Sale Act, 1882, was passed, beyond all doubt, to protect borrowers, and, if the real nature of the transaction could not be investigated, but only the form of the document could be regarded, the consequence would be that the Act would be evaded every day. The money-lender would always make the borrower execute an instrument that purported to be an absolute assignment, although the real transaction was only a loan of money on security. That consideration seems to me to be a strong ground for the conclusion that we are bound in such a case to consider the real nature of the transaction, and not to look at the form of the document only. It appears to me that the case was properly left to the jury, and that their finding was amply justified, having regard to the evidence.

KAY, L.J. I am of the same opinion. We have in this case to deal with two documents; the first purports to be an absolute assignment of certain chattels; and then there was an agreement between the grantor and the grantee of the chattels, by which the former affected to hire the chattels on the terms that he was to pay by way of rent certain sums covering such a period that, when the last of such sums was paid, the whole of the principal would be paid off, and that then the goods were to become again his property. The question is whether the transaction between the parties amounted to a bill of sale within the meaning of the Bills of Sale Act, 1882. The argument for the defendants was that here the only parties before the Court were the grantor and grantee, and that, even if their real intention was merely to create a security for money, as between these two parties there was by reason of the form of the instruments an estoppel which prevented either of them from alleging that to be the case. The question thus raised deserves careful consideration. Before referring to the authorities, I wish to consider the provisions of the

Act itself. It is quite clear that under the Bills of Sale Act, 1882, a bill of sale is void for want of registration even as between the grantor and grantee, if it be given as a security for money. This Act in terms only applies to bills of sale given by way of security for the payment of money; and under the Act of 1878 a bill of sale is not avoided for want of registration as between the grantor and grantee. The Act of 1882 adopts the definition clause of the Act of 1878, except as to bills of sale or other documents given otherwise than by way of security for money. The definition given by s. 4 of the Act of 1878 includes "assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels; and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." How can it be known with regard to documents coming within the species so enumerated, which are not expressly given by way of security for money, whether they are so given or not? It can only be ascertained by external evidence. Therefore, looking to the terms of the two Acts, and to the definition of a bill of sale, I think that, when the inquiry is whether a document, which on the face of it does not shew whether it is given as a security for money, is or is not so given, external evidence must, and the Act contemplated that it should, be admissible. In many cases in courts of equity where it was sought to shew that an assignment which purported to be absolute was really intended to be a mortgage, external evidence has been admitted for that purpose, but on the ground that the Court had power to rectify the instrument, and that it would be a fraud to insist on the absolute form of the instrument if it were only intended to be a security for money. Possibly, therefore, those cases do not carry us very far with relation to the present question. Here we have to deal with a particular Act of Parliament, the object of which could not be carried out unless it could be shewn by external evidence that the

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document in question was really only given as a security for money, and which must therefore have intended that this might be done. The decision in *In re Watson* (1), if I rightly understand it, is exactly to this effect. It was argued that that case was distinguishable, because there the question did not arise between the grantor and the grantee, but between the latter and the trustee in bankruptcy of the former; but, assuming that there is an estoppel between the original parties, nothing is clearer than that on general principles a trustee in bankruptcy or an execution creditor would be bound by it just as much as the bankrupt or execution debtor himself. I will deal in a moment with the answer of the defendants' counsel to this point. A trustee in bankruptcy or execution creditor is in privity with the bankrupt or execution debtor. He takes under the bankrupt or execution debtor not like a purchaser for valuable consideration, and it has been decided over and over again that he only takes what was vested in the bankrupt or execution debtor. Where property is subject to any rights by which it would be bound in the hands of the bankrupt or execution debtor, nothing can be more clear as a general proposition than that it would be subject to such rights as against the trustee in bankruptcy or execution creditor. The defendants' counsel admitted that as a general rule this was so; but he said that we were here dealing with a statute that gives special rights to a trustee in bankruptcy or execution creditor, because it avoids as against them a document which may be good as between the parties. I do not think that answer is sufficient. The Act of Parliament does not purport to give to a trustee in bankruptcy any benefit in the way of avoiding an estoppel that would bind the bankrupt. If a transaction be such as would create an estoppel as between the grantor and grantee of a bill of sale, I do not see anything in the Act to prevent such estoppel extending to a trustee in bankruptcy or execution creditor. It, therefore, appears to me that this case is completely governed by the decision in *In re Watson* (1), and I agree that it would be quite impossible to carry out the Act of 1882 unless the Court could inquire into the true nature of the transaction, whatever may be the form of it.

(1) 25 Q. B. D. 27.

Unless this could be done, the Act would soon become a dead letter. For these reasons I think that the application should be dismissed.

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Application dismissed.

Solicitor for plaintiff: *G. R. Harrison.*

Solicitor for defendant: *G. C. Lovell Fry.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. *Dec.* 11.

ONSLOW *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Settlement—Contingent Reversionary Interest—Stock vested in Trustees—Power to vary Investments—Stamp Act (33 & 34 *Vict.* c. 97), *s.* 3—*Schedule*, "*Settlement.*"

By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3, and schedule, an ad valorem duty is imposed on "any instrument . . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever":—

Held (affirming the decision of the Divisional Court), that a settlement of contingent reversionary interests in certain specified amounts of stock which were vested in trustees with power to vary the securities was liable to an ad valorem duty under the section and schedule.

APPEAL from the decision of Pollock, B., and Hawkins, J., on a case stated by the Commissioners of Inland Revenue pursuant to 33 & 34 Vict. c. 97, as to the amount of stamp duty chargeable on a settlement dated April 21, 1888. (1)

The instrument was a settlement of certain moneys, stocks, funds, and securities set forth in three schedules thereto, or of the interest of Marion Oliver, the settlor, therein; and it also contained certain covenants not relating to such moneys, stocks, funds, and securities, or the said interest therein.

The property specified in the three schedules was, according to the average prices at the date of the settlement, of the total aggregate value of 209,370*l.* 11*s.* 5*d.*

The title of Marion Oliver to the funds settled is set forth in the previous report. It will be sufficient here to state the nature of her interest.

(1) 24 Q. B. D. 584.

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With respect to the property in the first schedule, she was entitled to one moiety in reversion expectant on the death of her mother Georgina Oliver of the net proceeds of the sale and conversion of the real and personal estate of her uncle, James Pickup, devised by his will, subject to diminution on the contingency of her mother having another child; and to the other moiety in reversion expectant on the death of her aunt, Ann L. Pickup, and her mother, contingent on the death of her aunt without issue. The whole of these funds were standing in the name of the surviving trustee, who had power to vary the investments.

With respect to the property in the second schedule, the settlor was entitled to the funds therein specified in reversion expectant on the death of her mother, and subject to diminution on the contingency of her mother having another child. These funds also stood in the names of trustees with power to change the investments.

With respect to the property in the third schedule, the settlor was entitled to the funds therein specified in reversion expectant on the death of her mother and aunt, and contingent on her aunt dying without issue, and subject to diminution on the contingency of her mother having another child. These funds also stood in the names of trustees with power to change the investments.

At the date of the settlement Ann L. Pickup, the settlor's aunt, was of the age of sixty years, and had never been married; and Georgina Oliver, the settlor's mother, was of the age of fifty-four years.

The Commissioners were of opinion that the instrument was chargeable as a "settlement" with an ad valorem duty of 5*s.* per cent. on 209,370*l.*, amounting to 523*l.* 10*s.* and also with a deed stamp of 10*s.* under s. 8 of the Stamp Act. Their assessment was upheld by the Divisional Court, and the settlor and her husband appealed.

Danckwerts, for the appellants. The question turns on the meaning of the words in the schedule to the Stamp Act, 1870, under the heading "settlement," which is defined as "Any instrument, whether voluntary or upon any good or valuable consideration other than a bonâ fide pecuniary consideration,

whereby any definite and certain principal sum of money, or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever." The appellants contend that there is no settlement of any definite and certain sum of money, or of any definite and certain amount of stock. In the first place, the stocks are not definite and certain; for the various investments may be changed by the trustees, and when the property comes into the possession of the settlor the stocks may be quite different from what they are now. Also in the case of the property in the first schedule, the settlor will only be entitled to the net proceeds of the sale of the funds; and it would be impossible to put a present value upon those proceeds under s. 12 of the Act. In the second place, the amounts settled are uncertain. "Certain" means "sure," and the settlor's interest in great part of the funds in the schedule is only contingent. One portion will only vest in her in the event of her aunt dying without issue, and another portion, although vested, is liable to be divested if her mother should have another child. It is true that both those ladies are advanced in years; but that fact only affects the probability of the contingency happening, not the fact that the interest is only contingent. There is no legal distinction between the contingency of a woman of twenty having children and the contingency of a woman of sixty having children. The words of a Stamp Act are always to be construed strictly, and a sum of money which is only to belong to the settlor on a contingency cannot be called "certain": *Partington* v. *Attorney-General* (1); *Sanville* v. *Commissioners of Inland Revenue* (2); *In re Alsager's Settlement* (3); *Hughes* v. *King*. (4)

Sir E. Clarke, S.G., and *G. B. Rosher*, for the respondents, were not called on.

LINDLEY, L.J. The case before us raises a question of the true construction of a small portion of the Stamp Act, 1870, namely, that part which relates to settlements. The instrument on which the point arises is the marriage settlement made

(1) Law Rep. 4 H. L., at p. 122.
(2) 10 Ex. 159.
(3) 10 L. T. (N.S.) 238.
(4) 1 Starkie, 119.

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between Mr. Onslow and a young lady he was then about to marry; and it contains recitals shewing that she was entitled to considerable property. Some of it was contingent, some of it was vested, and subject to a possible divesting. The property is enumerated or referred to in three schedules, and with respect to the first schedule I think the recital on page 3 is important: "Whereas the personal property now subject to the trusts of the said will is specified in the first schedule hereto, and stands in the name of George Oliver, the surviving trustee." Now, when we come to deal with that, we find that what the settlement does with it is this. It says, in pursuance of the agreement, and so on, the lady assigns to the trustees "all that the entirety of the net proceeds of the sale, calling, and conversion of the real estate and personal estate devised and bequeathed" by the will to which I have alluded. That is, the first part. Then she goes on in the same way to assign the proceeds of all the property comprised in the second schedule; and, thirdly, all the property specified in the third schedule.

Now, when we come to look at these schedules, we find there is very considerable property specified in them, and the value of the whole at the date of the settlement which has been ascertained, in accordance with s. 12 of the Act, is upwards of 200,000*l*. It is said that the Commissioners who have assessed the stamp upon this settlement at 5*s*. per cent. upon the amount which I have alluded to have gone upon the wrong principle; it is said that there is no settlement, and it is said that there is no settlement of a "definite and certain amount" within the meaning of the Stamp Act. In order to deal with that I will read what the Stamp Act says—it is in the schedule, under the head "Settlement": "Any instrument, whether voluntary or upon any good or valuable consideration, other than a bonâ fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner

whatsoever. For every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled, 5*s.*" Now we are asked to say that there is not any settlement, and that there is not "any definite and certain" sum within the meaning of that provision. Mr. Danckwerts, who has expended a great deal of ingenuity in endeavouring to establish that proposition, appears to me to have failed. I cannot read the settlement without coming to the conclusion that it is a settlement in the ordinary acceptation of that term—just as much a settlement as any other marriage settlement is a settlement.

The real stress turns upon there being some uncertainty—nothing definite and certain; and the uncertainty is put in various ways. If Mr. Danckwerts' argument were pressed to its full extent, it would come to this: that no settlement of any property could be stamped with an ad valorem stamp unless the interest of the settlor were a vested interest—not subject to be divested at all. That is impossible. Such a construction as that is, I think, quite inconsistent with the terms of the Act itself. Then he endeavoured to satisfy us that there might be a difference between a vested interest subject to be divested and a contingent interest. I can find nothing in the Act to warrant anything of the sort.

Just let us see how these things are done and what the Act intends should be done. The stamp authorities—the Commissioners of Inland Revenue—look at the document; they see what it is that is settled, and they ascertain the value of the amount if it is stock in accordance with s. 12; they look to see whether the sum which is settled is a certain and definite sum so ascertained; if it is, then 5*s.* per cent. is calculated upon it. I put to Mr. Danckwerts the case—a simple case enough—of the settlement, say, of one-fifth of 100,000*l.*; what would be the stamp duty for that? Obviously, not 5*s.* per cent. on 100,000*l.* That would be absurd. It is 5*s.* per cent. on the one-fifth. When we go further and see whether the 5*s.* per cent. is to fluctuate according to whether the interest is contingent, or subject to be divested, or vested, we find that the language of the Act warrants nothing of the kind. The amount settled, and not the nature of the settlor's interest in it, is what

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the statute deals with. I think the Commissioners were right, and that the appeal ought to be dismissed.

BOWEN, L.J. I am of the same opinion, and will add nothing to what has been said, except this, that with regard to a large portion of Mr. Danckwerts' argument, it seems to me that he omits to remember that "definite and certain" in the clause which we are considering are terms applied, not to the interest or the nature of the interest, but to the amount of the stock, and that the amount of the stock does not become uncertain because the chance of getting the stock may be uncertain.

FRY, L.J. I am of the same opinion. The clause in the schedule which we have to construe attaches itself to any instrument whereby "any definite and certain amount of stock is settled." Now it is obvious at once that the words I have read contain no definition or reference to the interest of the settlor in that "definite and certain amount." They simply refer to the stock. Two possible readings of those words seem to me to occur to the mind: the one would be to say, there was no settlement of that sum unless the settlor had an absolute and indefeasible interest; the other is to say that it applies to every case in which the settlor had any interest in that sum, whether that interest be vested or liable to be divested, or contingent, provided it is an interest.

Now, in my opinion, the section clearly relates to the second class of interest. The section says nothing about the definiteness, the vesting, or the contingency of the interest, and it applies to every interest, whether vested, whether liable to be divested, whether contingent or not, in any sum of which it may be said that it is a definite and certain sum of stock. That is my view of the meaning of this section. Accordingly, I think the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Rowcliffes, Rawle & Co.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

M. W.

[IN THE COURT OF APPEAL.]

C. A. 1890 *Nov.* 24.

THE DARLINGTON WAGON COMPANY, LIMITED *v.* HARDING AND THE TROUVILLE PIER AND STEAMBOAT COMPANY, LIMITED.

Arbitration—Reference "in a Cause or Matter"—Consent—Reference of all Matters in Difference—Award—Application to set aside—"Equivalent to the Verdict of a Jury"—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14 & 15.

By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14: "In any cause or matter other than a criminal proceeding by the Crown the Court or a judge may order the whole cause or matter or any question or issue of fact arising therein to be tried before a special referee or arbitrator respectively agreed on by the parties, and by s. 15 the report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury."

An order was made by consent of the parties to an action to refer all matters in difference to arbitration. The order did not in terms refer the action, but it gave directions as to the costs of it. On an application to set aside or remit the award of the arbitrator on the ground that he had taken an erroneous view of the law and facts of the case:—

Held, by the Queen's Bench Division, that the finality of the award was not affected by s. 15 of the Arbitration Act, 1889, and that the award could not therefore be reviewed by the Court:—

Held, by the Court of Appeal, that the order of reference, as it included matters other than the action, was not one that could be made under the authority either of s. 57 of the Judicature Act, 1873, or of the Arbitration Act, 1889, but owed its validity to the consent of the parties only, and that consequently the award was final, and could not be reviewed by the Court.

APPLICATION on behalf of the defendant Harding to set aside or remit the award of an arbitrator.

The plaintiff company were contractors for the erection of a pier at Trouville-sur-Mer, and they sued the defendants for work done under the contracts that had been entered into. An application to enter judgment under Order XIV. came before a judge at chambers, and it appeared that since the commencement of the action other work had been done for which the plaintiffs claimed to be entitled to be paid. It was thereupon agreed that an order of reference should be made and an order (1) was drawn up "by consent," referring "all matters in difference between

(1) In the form given in App. K, No. 24.

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the parties" to an arbitrator. The 5th clause of the order was: "The costs of the said cause, and the costs of the reference and award shall abide the event," and the 10th clause was: "In the event of either of the said parties disputing the validity of the said award, or moving the Court to set it aside, the said Court shall have power to remit the matters hereby referred or any or either of them to the reconsideration of the arbitrator." This order was dated December 10, 1889. By a subsequent agreement made in May, 1890, it was agreed between the parties that all claims and counter-claims and matters in dispute between them should be referred to the arbitrator as if the same had been in existence at the commencement of the action, and had been the subject of the action. The arbitrator awarded that there was due from the defendants to the plaintiffs a sum of money largely exceeding the amount claimed in the action.

1890. Nov. 1. *J. Eldon Bankes*, in support of the application. The findings of the arbitrator are liable to be set aside. The award is subject to the Arbitration Act, 1889 (1), by s. 15 of which, in every case of reference to an arbitrator under an order of the Court, the arbitrator is placed in the position of an official referee, and his award is to be "equivalent to the verdict

(1) 52 & 53 Vict. c. 49, s. 14, enacts: "In any cause or matter other than a criminal proceeding by the Crown:

(*a.*) "If all the parties interested who are not under disability consent; or,

(*b.*) "If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or,

(*c.*) "If the question in dispute consists wholly or in part of matters of account;

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court."

Sect. 15 enacts "(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by rules of Court, and subject thereto as the Court or a judge may direct.

"(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury."

of a jury." These words are taken from s. 58 of the Judicature Act, 1873, where they are used to define the legal effect of the report of an official referee. They were judicially interpreted by Brett, L.J., in *Longman* v. *East* (1), as entitling the Court to consider whether or not the findings of the official referee were against the evidence, and whether or not he had done what, in a judge trying a case with a jury, would have amounted to misdirection.

R. M. Bray appeared for the defendant company.

Jelf, Q.C., and *W. S. Robson*, for the plaintiff, were not heard.

DAY, J. The terms of s. 15 of the Arbitration Act, 1889, are wide, but I cannot think that they were intended to affect the finality of awards such as that here sought to be set aside. Had such been the intention of the legislature, it must, as it seems to me, have been expressed in clear and appropriate language. The words "equivalent to the verdict of a jury" may be construed as referring to some other incident of a verdict, that, for example, of its enforceability by execution. The judgment which has been cited deals with the force of these words when applied to the report of an official referee, a proceeding in its very nature the reverse of final, and can therefore have no bearing on the case before the Court. I am of opinion that effect must be given to the objection taken, and that we are not at liberty to investigate the evidence given in this case for the purpose of ascertaining whether the arbitrator came to a mistaken conclusion as regards either law or fact. The application will be refused.

LAWRANCE, J. I am entirely of the same opinion.

Application refused.

H. D. W.

The defendant appealed.

1890. Nov. 24. *Finlay, Q.C.*, and *J. Eldon Bankes*, in support of the appeal. The agreement to refer was made before the commencement of the Arbitration Act, 1889, which came into operation on January 1, 1890, but nothing had been done under

(1) 3 C. P. D. 142, at p. 155.

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it except to hand the arbitrator some documents, consequently the Act applies by virtue of s. 25. (1) The effect of the order was to refer the action and some other matters, and s. 15 of the Act does not the less apply because by agreement something is referred besides the action. The action is gone and could not be proceeded with, and the costs are dealt with by clause 5 of the order. Consequently the reference of the action must be dealt with under the Act, and this carries with it the dispute as to other matters not included in the action. The statute does not speak of the reference "of" a cause, but of any reference "in" a cause, and admitting that this order could not have been made without consent, it is none the less an order in a cause. Sect. 14 of the Act is in the same terms as s. 57 of the Judicature Act, 1873, and neither section says that the reference is to be only of a cause or matter. Sect. 15 is more extended than s. 14, and applies to all references in a cause or matter. [They cited *Clark* v. *Sonnenschein*. (2)]

R. M. Bray appeared for the defendant company.

Jelf, Q.C., and *W. S. Robson*, were not called on.

LORD ESHER, M.R. In this case an order of reference was made before the Arbitration Act, 1889, came into force; but I shall assume that, if the case is one that could be brought within the Act, it would be so brought by s. 25. The question then is whether this case can be brought within the scope of the Act. Sect. 14 gives power to refer in certain cases, and we must consider whether this order could have been made under that section. I think it could not. It is not a reference by the judge of the whole cause or matter or of any question or issue of fact arising therein. It is an order made by consent for the reference of all matters in difference. That is a much larger order than any which a judge has authority under the Act to make, and if this were an order which purported to be made under the statute, it would have been an excess of jurisdiction.

(1) 52 & 53 Vict. c. 49, s. 25, "This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act."

(2) 25 Q. B. D. 464.

The order was not therefore made under s. 14, even if by reason of s. 25 the case is brought within the Act. I think that really this order was made at a time when s. 57 of the Judicature Act, 1873, was in force, but if so the authority there given is to refer a question or issue of fact or a question of account, and this order is larger than any that could be made by a judge under that section. It could not be made, and was not made under s. 57 of the Judicature Act, 1873, or under s. 14 of the Arbitration Act, 1889. It is said that it is a good order of reference, and no doubt that is so, but it was made under the general authority of a judge to act on the consent of the parties and appoint an arbitrator. The whole validity and force of the order of reference arises from the consent of the parties. It is, however, suggested that though not within s. 14 the order may be within s. 15 of the Arbitration Act, which deals with "all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge." If the matter stopped there, the argument would have force, but the words "in any cause or matter" follow and make it plain to my mind that s. 15 is intended to prescribe the mode of carrying out references under the previous section. I think we may go further than to say that if the parties intended to bring the reference within s. 57 of the Judicature Act, 1873, or else the Arbitration Act, 1889, they have not succeeded in doing so, for it is obvious to my mind that the parties who consented to this order did not intend it to operate under either Act. I have come, therefore, to the conclusion that there is no power to review the award for any ground upon which an ordinary award made on a reference by consent could not be reviewed, and that this application must be refused.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Satchell & Chapple, for Davies & Balkwill, Newcastle-on-Tyne.*

Solicitors for defendants: *Bird & Moore.*

A. M.

1890
Nov. 10.

MACKAY *v.* McGUIRE.

Parliament — Registration—Borough Vote—Occupation Franchise—Effect of Bankruptcy on Occupation as Tenant—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 20—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.

A claimant in respect of the occupation of a house in a borough as a yearly tenant was adjudicated a bankrupt during the qualifying period. It appeared that the landlord, after the adjudication, had continued to receive rent from the claimant, and had allowed him to remain in undisturbed possession during the remainder of the qualifying period. The trustee in the bankruptcy had not in any way interfered:—

Held, that the facts shewed a continuous occupation by the claimant as tenant within the meaning of s. 3 of the Representation of the People Act, 1867, and that he was entitled to be registered as a voter.

CASE stated by the revising barrister for the borough of York.

The question to be decided was the validity or otherwise of an objection made to the retention of the name of William Britton on Division I. of the list as a parliamentary voter and a burgess in respect of a dwelling-house in Watergate in the borough, on the ground that "he had not occupied as tenant the house in question through the qualifying period." The case contained the following statement: "The voter was a yearly tenant. He was adjudicated bankrupt on October 17, 1889. His occupation of the house was never disturbed by the landlord or any one else, so that from end to end of the qualifying period it was continuous. For the residue of the period after the adjudication, the landlord on the usual quarter-days accepted the rent from the voter. No act of any kind in relation to the bankrupt and his dwelling-house was ever done or signified by anyone officially connected with the bankruptcy." The revising barrister held that the objection failed. The objector appealed against the decision, and against three other decisions of the revising barrister in cases raising the same point, the appeals in which were consolidated.

J. Scott Fox, for the appellant. The objection is valid. The vesting of the term in the trustee from the moment of adjudication, under s. 20 of the Bankruptcy Act, 1883, was sufficient

to constitute a cesser of the continuous occupation of the house by the voter "as tenant," which is necessary to satisfy s. 3 of the Representation of the People Act, 1867.

T. Willes Chitty, for the respondent. There was, in fact, no break in the occupation of the house. Bankruptcy is not a legal disqualification for either the parliamentary or the municipal franchise, and it cannot, therefore, have been intended that a section of the Bankruptcy Act, 1883, should indirectly cause disfranchisement. Continuous occupation, in whatever capacity, is enough to give a municipal qualification. Here there was also continuous occupation as "tenant" sufficient to give a parliamentary qualification. The voter paid rent during the whole period, and after the adjudication continued in possession as a tenant at will either to the landlord or to the trustee. [He referred to *Doe d. Hull* v. *Wood* (1) and *Doe d. Palmer* v. *Andrews*. (2)]

J. Scott Fox, in reply. The tenancy ceased after the adjudication, and the possession of the voter was thenceforward that of a mere licensee. Mere presence on the land is not a qualification for the municipal franchise. [He cited *Rogers* v. *Harvey* (3), *Richardson* v. *Longridge* (4), and *Maclean* v. *Pritchard*. (5)]

GRANTHAM, J. The question is by no means free from difficulty. On the whole, however, I am of opinion that the voter after the bankruptcy continued in the occupation of the house as tenant within the meaning of the statute, which ought, I think, to be construed in such a manner as to include rather than to exclude. The voter was a tenant before the bankruptcy, and, so far as his own conduct and that of his landlord was concerned, he remained a tenant after the bankruptcy; but the question is, what was the legal effect of the bankruptcy on the nature of his occupation? It is said that the tenancy from year to year was property and that it vested in the trustee upon the adjudication; but there is a distinction between the property in the tenancy and the occupation under it, and I do not think that the occupation can be regarded as having vested in the

(1) 14 M. & W. 682.
(2) 4 Bing. 348.
(3) 5 C. B. (N.S.) 3.
(4) 4 Taunt. 128.
(5) 20 Q. B. D. 285.

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trustee. Whether because he did not know that the tenancy had vested in him, or because he regarded it as of no value to the creditors, the trustee did not take possession. Did the voter then after the bankruptcy occupy as a mere licensee of the trustee or as a tenant? I think he did so as a tenant. There was no change in the voter's position. The tenancy vested in the trustee; but the landlord continued to take rent from the voter as before. I think that the result was a tenancy by estoppel, relating back to the date of the adjudication, and that if for some very short time the voter occupied as a licensee of the trustee, the maxim, "De minimis non curat lex" applies. I am, therefore, of opinion that the revising barrister was right, and that the appeal must be dismissed.

VAUGHAN WILLIAMS, J. I assent, though with some misgiving. The statute requires, where the voter claims as a tenant, continuous occupation by the voter as a tenant during the whole qualifying period without interruption. Here, during the qualifying period on October 17, the day on which the voter was adjudicated a bankrupt, the tenancy of the voter, which was a yearly tenancy, vested in the trustee without any necessity for election. The question therefore is, was the occupation of the voter on that day that of a tenant, and if so, that of a tenant to whom? The case cannot, in my opinion, be dealt with without answering these two questions; and I have come on the whole to the conclusion that the voter was on that day a tenant, and a tenant to the landlord. If a yearly tenancy comes to an end by notice to quit given during the year, but the tenant wrongfully holds over, he is at first a trespasser and may be so treated; but if the landlord allows him to stay he becomes a tenant on sufferance, and if the landlord afterwards accepts rent from him he becomes a tenant at will. If this is a similar case, the effect of the receipt by the landlord of the rent for the quarter which included the day of the adjudication was to create a tenancy at will between him and the voter from that day, if not from an earlier date, to the date on which the rent was received, and the voter was therefore in the occupation of the qualifying premises as a tenant on the day of the adjudication.

It was argued that the case was not analogous to one of holding over, on the ground that, though as between the voter and his landlord the receipt of the rent might create a tenancy by estoppel, it could not prevent a break in the tenancy of the voter, because of the intervening right of the trustee, who became tenant in possession by operation of law. I thought that there was force in this consideration; and had the trustee been shewn to have in any way asserted his right, I should have held without hesitation that nothing which took place between the landlord and the voter could have prevented a break in the occupation of the voter, owing to the vesting of the tenancy in the trustee. As, however, the revising barrister has found that the trustee here took no step to assert his right, I think the case may be regarded as analogous to one of holding over. I therefore agree with my learned brother.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for appellant: *Iliffe, Henley, & Sweet, for Russell & Mackay, York.*

Solicitors for respondent: *Sharpe, Parkers & Co., for Guy, York.*

H. D. W.

BROWN APPELLANT; TOMBS, RESPONDENT.

Nov. 8.

Parliament—Claims—Signature of Notice of Claim—6 & 7 *Vict. c.* 18, *s.* 38.

The appellant gave his agent a written authority to make and sign on the appellant's behalf a claim to vote in one of the parliamentary divisions of a county, or in the administrative county, or both, as he might seem to be qualified. A notice of claim to be placed on Division I. of the occupiers' list was thereupon prepared, and signed with the appellant's name by a clerk of the agent under his direction:—

Held, that the affixing of the signature to the notice of claim by the clerk instead of the agent did not establish that the appellant had not given due notice of his claim within 6 & 7 Vict. c. 18, s. 38.

CASE stated by the revising barrister for the Harborough Division of the county of Leicester.

At a Court held at Leicester on September 19, 1890, the respondent opposed the claim of the appellant to be placed on Division I. of the occupation list for the parish of Newfound

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Pool. A notice of claim, purporting to be signed with the appellant's name, "Thomas Brown," and containing all necessary particulars as to the qualification of the claimant to be placed on the occupation list, was duly delivered to the overseers of the parish, and was published by them as part of the list of occupation claimants in the ordinary course.

It appeared that the appellant had signed and given to one Thomas Coppack the following written authority to make a claim on the appellant's behalf: "I hereby give authority to Thomas Coppack, of Bishop Street, Leicester, to make and sign on my behalf a claim to vote in the Harborough parliamentary division of Leicestershire, or in the administrative county of Leicester, or both, as I may seem to be qualified, and to appear on my behalf in support of the said claim." It was proved that the signature "Thomas Brown" had not, in fact, been affixed to the claim by Coppack, but by John William Pearce, a clerk occasionally employed in Coppack's office. In so signing the appellant's name, Pearce acted under the direction of Coppack, who also authorized the filling in of the blank spaces in the body of the printed notice of claim.

The revising barrister held that the appellant had not proved that he had given due notice of his claim to be inserted in the list of voters, within the meaning of 6 & 7 Vict. c. 18, s. 38, and expunged the appellant's name, and the names of eighteen other persons, whose claims were opposed on similar grounds, from the list of occupation claims.

R. S. Wright, for the appellant. The revising barrister was wrong in coming to the conclusion that the appellant had not given due notice of his claim to be inserted in the list of occupation voters. The signature of the claim by Pearce under the direction of Coppack, to whom the appellant had given express authority to make and sign the claim, was sufficient. (1)

[He was stopped.]

(1) The appellant's counsel also contended that under the Registration Acts the revising barrister ought to have revised the list of occupation claimants as a list of voters, and ought not to have entertained the question whether or not the appellant's notice of claim was duly signed; but as the judgment of the Court was not given upon this point, it is thought unnecessary to state more fully the argument upon it.

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J. V. Austin, for the respondent. By s. 38 of 6 & 7 Vict. c. 18, the revising barrister shall insert in any list of voters for any city or borough (extended to occupiers in counties by 30 & 31 Vict. c. 102, s. 30), the name of every person omitted "who shall be proved to the satisfaction of such barrister to have given due notice of his claim to be inserted in such list." It is submitted that due notice of the appellant's claim was not given in the present case, because the notice of claim was not duly signed. Admitting that the signature of the appellant's name by Coppack would have been sufficient, Coppack could not delegate the exercise of the discretion given to him by the written authority of the appellant. There are many cases which shew that where a discretion to act for the principal is given to an agent, the maxim "Delegatus non potest delegare" applies. Sect. 46 of 6 & 7 Vict. c. 18, enables the revising barrister to make an order for costs against persons making groundless, or frivolous and vexatious, claims. Here, the revising barrister could not have made an order for costs against the appellant, because he never authorized Pearce to sign the claim.

[He referred to *In re Sale.* (1)]

GRANTHAM, J. I entertain no doubt about the question raised in this case. When once it is admitted that the signature of the appellant's name by his agent Coppack would have been sufficient, the mere fact that the signature was written by the clerk of the agent at his direction is not enough to invalidate the notice of claim. I am of opinion that the decision of the revising barrister was wrong, and that our judgment should be for the appellant.

VAUGHAN WILLIAMS and LAWRANCE, JJ., concurred.

Judgment for the appellant. Leave to appeal was refused.

Solicitors for appellant: *Field, Roscoe & Co., for A. H. Burgess, Leicester.*

Solicitors for respondent: *Crowders & Vizard, for H. A. Owston, Leicester.*

(1) 50 L. J. (C.P.D.) 113.

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[IN THE COURT OF APPEAL.]

PLANT *v.* POTTS.

Parliament — Registration — County Vote — Ownership List — Description of Nature of Qualification—Power of Revising Barrister to Amend—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 24, *s.* 28, *sub-s.* 1, 12, 13—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 1, *sub-s.* 2.

The nature of the qualification of a person in the list of ownership claimants was described in the third column as "freehold house." The revising barrister, on proof that the claimant possessed a leasehold qualification in respect of the house in question, substituted "leasehold" for "freehold" in the third column:—

Held (affirming the decision of the Queen's Bench Division), that the revising barrister had no power to make the alteration.

CASE stated by the revising barrister for the Altrincham division of Cheshire.

The name of Priestley Aked, which was on the list of ownership claimants for Cheadle in the division in respect of a qualification described in the third column as "freehold house," having been objected to, it was proved that the voter had a leasehold qualification in respect of the house. The revising barrister held that he had power to amend, and substituted "leasehold" for "freehold" in the third column of the list. The objector appealed.

Lindsell, for the appellant. The revising barrister had no power to make the amendment. The effect was to substitute a wholly new qualification for that described in the list, contrary to s. 28, sub-s. 13, of the Parliamentary and Municipal Registration Act, 1878. (1) The decisions in the Court of Appeal in

(1.) By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 24: "Any person who is entered on any list of voters for a parliamentary borough or any burgess list, subject to revision under this Act, for a municipal borough, and whose name or place of abode or the nature of whose qualification or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, make and subscribe a declaration in the form, &c. . . . If the declaration is sent as aforesaid in due time . . . the revising barrister shall receive the declaration as evidence of the facts declared to."

By s. 28: "A revising barrister

Foskett v. *Kaufman* (1) and *Dashwood* v. *Ayles* (2), the former of which overrules the judgments of the Divisional Courts in *Porrett* v. *Lord* (3) and *Ford* v. *Hoar* (4), shew that the alteration was illegal.

F. Marshall, for the respondent. The revising barrister had power to make the amendment under sub-s. 12 of s. 28. That sub-section applies in terms to the case. "The matter proved before" him "in relation to the alleged right of the" voter "to be on the list" being "in his judgment insufficient to constitute" a freehold, but "sufficient to constitute" a leasehold "qualification," the revising barrister gave effect to the evidence by making the alteration. The construction of the sub-section was not defined by the Court of Appeal in *Foskett* v.

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shall, with respect to the lists of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following:—

(1.) "He shall correct any mistake which is proved to him to have been made in any list."

(12.) "Where the matter stated in a list or claim, or proved to the revising barrister in relation to any alleged right to be on any list, is in the judgment of the revising barrister insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the revising barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriate list, and shall expunge it from the other list, if any, in which it is entered:

(13.) "Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same."

By the Registration Act, 1885 (48 Vict. c. 15), s. 1, sub-s. 2, it is enacted that certain sections of the Parliamentary and Municipal Registration Act, 1878, including s. 28, but not s. 24, "shall apply to the registration of ownership voters in parliamentary counties in like manner as to the registration of occupation voters."

(1) 16 Q. B. D. 279.

(2) 16 Q. B. D. 295.

(3) 5 C. P. D. 65.

(4) 14 Q. B. D. 507.

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Kaufman. (1) The construction contended for is favoured by expressions in the judgments of Lord Esher, M.R., and Cotton, L.J., in that case (2), and is, it is submitted, the only construction which will give their natural effect to the terms of the sub-section.

Lindsell, in reply.

VAUGHAN WILLIAMS, J. I am of opinion that this appeal should be allowed. I think that under the statutes a revising barrister has no power to substitute "leasehold" for "freehold" in the third column, that which describes the nature of the qualification, in an ownership list of voters. His power to make such an amendment is in my judgment limited to cases in which a declaration has been made by an occupation voter pursuant to the Parliamentary and Municipal Registration Act, 1878.

Plainly before the passing of that Act, as the law stood under the Registration Act of 1843, the amendment could not have been made unless a new claim had been duly sent in and published. The question, therefore, is whether the amendment can now be made in a case in which there has not been either a new claim under the Act of 1843, or a declaration under the Act of 1878. To this question I am of opinion that only a negative answer can be given. I cannot believe that the legislature intended the qualification of a voter to be altered by the revising barrister in the absence of a new claim or a declaration as the equivalent of a new claim. This view is, I think, supported by the observations on the effect of *Foskett* v. *Kaufman* (1), which were made by Lord Esher, M.R., in *Dashwood* v. *Ayles.* (3) He seems to assume that the law as to the amendment of the qualification is still as it was under the Act of 1843, with the single exception that an occupation voter is now entitled under s. 24 of the Act of 1878, in place of making a new claim, to make a declaration, which is primâ facie evidence of the qualification which he seeks to have substituted. For this reason I am of opinion that the appeal must be allowed.

As to the construction which we have been invited to give to

(1) 16 Q. B. D. 279. (2) At pp. 288, 291.
(3) 16 Q. B. D. 295, at p. 299.

sub-s. 12 of s. 28 of the later Act, I think it open to precisely the same objection as that discussed by the Court of Appeal in *Foskett* v. *Kaufman* (1) with reference to sub-s. 1. The effect of this construction would be to make sub-s. 13 entirely inoperative. No single case could be suggested which would be excluded under sub-s. 12, but included under sub-s. 13. We should therefore, in my opinion, be following *Foskett* v. *Kaufman* (1) if we were to hold that the power of amendment under sub-s. 12 is subject to the limitation which the Court of Appeal there held applied under sub-s. 1, and that the power, therefore, can only be exercised under sub-s. 12 in cases in which there has been a declaration pursuant to s. 24.

LAWRANCE, J. I am entirely of the same opinion, for the reasons which have been given by my learned brother.

GRANTHAM, J. I have the misfortune to differ from my learned brothers. Undoubtedly, according to the early theory of registration, the third column of a list of voters was regarded as almost a part of the constitution; though it is worthy of notice that in *Nicholls* v. *Bulwer* (2) a case decided under the Registration Act of 1843, Willes, J., no mean authority on the construction of statutes, held that the third column might be altered by the revising barrister. The majority of the Court of Common Pleas there thought otherwise, and I agree with the decision; as, if this were a case under the Registration Act of 1843, I should agree with that just given. But this case arises under the Parliamentary and Municipal Registration Act, 1878, and that Act was notoriously passed because it was felt that the decisions of the revising barristers on technical objections had led to the disfranchisement of numbers of voters who would have kept their votes had the revising barristers been entrusted with a proper power of amendment. It was the object of the Act to give them this power; but, if my learned brothers are right in their construction of s. 28, I scarcely think that the legislature has proved very successful. I cannot, however, believe that it was intended that these sub-sections of s. 28, a section of general application

(1) 16 Q. B. D. 279. (2) Law Rep. 6 C. P. 281.

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dealing with the entire course of procedure in the registration courts, should be a dead letter except in the particular case of a declaration under s. 24—a section which deals with that matter alone. We are bound, I think, if possible, to construe these sub-sections as giving facilities for the correction of mistakes generally; and it is too late now to argue that, subject to s. 24, the third column is still as sacred and inviolable as ever; for *Ford* v. *Hoar* (1) and *Lynch* v. *Wheatley* (2) are cases in which amendments very similar to that here made by the revising barrister have been sustained, apart from a statutory declaration.

Foskett v. *Kaufman* (3), in the Court of Appeal, to which I should, of course, defer if I thought that it applied, was in my opinion a different case to the present. The ratio decidendi there was, as the Master of the Rolls says, that, if the amendment had been allowed, the result would have been that the objector, between whom and the voters the scales are to be held fairly, would have been taken by surprise and placed at a disadvantage. There, the application being to substitute for "dwelling-house, 5, Victoria Cottages," "dwelling-houses in succession, High Street, Wapping, and 5, Victoria Cottages," in an occupiers' list, the objector could not have tested the statement as to the occupation of the house in High Street, Wapping. But here the application being to substitute "leasehold" for "freehold" in the third column of an ownership list, as the nature of the qualification of the voter objected to in respect of the ownership of a house, the house remained the same, and the objector, who would know what constitutes a leasehold qualification at law, was not prejudiced in any way by the alteration. The alteration was, in my opinion, authorized by sub-s. 12. Sub-s. 12 is scarcely alluded to in *Foskett* v. *Kaufman* (3), and I do not think that we are in any way precluded by that decision from holding that the words "except as herein provided," in sub-s. 13, apply to sub-s. 12 as well as to s. 24. The general effect of sub-s. 13 is, in my opinion, to prevent the revising barrister from so altering the lists as to admit at the registration court what would be really and substantially new claims. I therefore think

(1) 14 Q. B. D. 507. (2) 14 Q. B. D. 504.

(3) 16 Q. B. D. 279.

that the appeal should be dismissed; but, as the majority of the Court are of the contrary opinion, the appeal will be allowed.

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Judgment for the appellant. Leave to appeal granted.

H. D. W.

The respondent appealed.

F. Marshall, for the respondent.

Lindsell, contrà.

LORD ESHER, M.R. The question in the present case seems to be entirely confined to a consideration of the power of a revising barrister to make amendments in the list of ownership voters, and may be stated thus: Inasmuch as s. 28 of the Parliamentary and Municipal Registration Act, 1878, is by reference incorporated into the Registration Act, 1885, which is the statute applicable to the registration of ownership voters, what is the true construction of that section, and especially of sub-ss. 12 and 13, with regard to the power of a revising barrister when dealing with the ownership lists.

The difficulty that has arisen has been mainly caused by the new mode of drafting Acts of Parliament—that is to say, the bringing by reference into a later Act sections of a previous Act of Parliament. That s. 28 of the Act of 1878 has been brought into the Act of 1885 is perfectly clear, and the latter Act must be construed as though that section were written into it. The construction that was to be placed upon that section as forming part of the Act of 1878 was determined in *Foskett* v. *Kaufman* (1), where, as I understand that decision, it was held that, in a case like the present, if sub-s. 12 stood alone without any limitation being placed upon the powers there given, that sub-section would have given the revising barrister power to make the alteration now contended for; but that sub-ss. 12 and 13 must be read together, and that sub-s. 13 was a proviso by way of exception on sub-s. 12; that, therefore, the effect of reading the two sub-sections together was, that although the revising barrister might by virtue of sub-s. 12 have the power to amend an inaccurate or insufficient description of the qualification as described in the third column, yet if the description in that column did sufficiently and accurately describe a qualification known to the law,

(1) 16 Q. B. D. 279.

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then by virtue of the proviso the revising barrister would have no power to alter that sufficient description into a sufficient description of another qualification; in other words, a revising barrister can only amend an insufficient description of the qualification, but cannot alter the description into a description of another qualification.

That seems to be the effect of the decision in that case. But the Court went on to point out (although it was unnecessary for their decision) something to which the words, "except as herein provided," in sub-s. 13 could apply, and they said that in that Act they were applicable to s. 24; so that, according to that decision, even in boroughs the revising barrister could not alter a sufficient description of one qualification into another qualification, and the remedy for a person who found that the description of his qualification in the third column was really a description of a qualification which he had not was by making a declaration under s. 24, when the revising barrister would have power under the statute to alter the list by inserting the proper qualification, though he could not have done so by virtue of his ordinary powers of amendment. The revising barrister's power of amendment is, therefore, only a limited one, though larger than before the Act of 1878, prior to which he could not have altered one qualification into another at all, though now he can do so if a declaration has been made under s. 24 of that Act. In the course of my judgment in *Foskett* v. *Kaufman* (1), I pointed out certain reasons which in all probability influenced the legislature in their determination to prevent one qualification being altered into another; but those reasons were merely conjectural, and do not affect the interpretation of the Act itself, which is what I have already said. It is clear, therefore, that if this case were one under the Parliamentary and Municipal Registration Act, 1878, the revising barrister would have had no power to make the alteration.

But we must now read those two sub-sections as though they were written into the Act of 1885; and we shall see the result of bringing in sections by reference. They are brought in by s. 1, sub-s. 2, of that Act, which provides that certain sections of the Act of 1878 are to apply to the registration of ownership voters in parliamentary counties in like manner as to the registration

(1) 16 Q. B. D. 279.

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of occupation voters, and among those sections is specified "section twenty-eight'(relating to the duties and powers of revising barristers)"; but s. 24 is not specified, and is therefore not to be read in. How, then, are we to read sub-ss. 12 and 13 as read into the Act of 1885? Beginning with sub-s. 12, it will be read in exactly the same manner as in the former Act, as giving certain powers of amendment; but sub-s. 13 is introduced by the words, "except as herein provided," which, reading the sub-section as written into the Act of 1885, mean except as provided in the Act of 1885; now s. 24 is not brought into the Act of 1885, so far as regards the registration of ownership voters, and therefore those words cannot be applicable to s. 24. It was suggested that the word "herein" originally meant "in the Act of 1878," and that, therefore, the words, "except as *herein* provided," when read into the Act of 1885, meant "except as provided in the Act of 1878," the effect of which would be to bring s. 24 of the Act of 1878 into the Act of 1885; but I cannot assent to this contention, bearing in mind the fact that s. 28 is expressly in terms brought into the Act of 1885, whereas s. 24 is not. I think, therefore, that that section is neither directly nor indirectly brought into the Act of 1885 for the purpose of the revision of the ownership lists.

That being so, what is the meaning of the introductory exception in sub-s. 13? If it applies only to sub-s. 12, it does not enlarge the revising barrister's power of amendment; and if it has no application at all, the sub-section must be rejected. It is possible, however, that sub-s. 13 may be applicable to the revision of ownership lists in the following way. The Registration Acts passed before 1885 are to be read with the Act of 1885, except where it is obvious that they are not to be so read, and therefore there is to be read into the later Act the provision in the Act of 1843 giving power to a voter who is upon the register or who has sent in a claim to the overseers, and who discovers before it is too late that there is a mistake in the description of his qualification, to send in a fresh claim with the right qualification. In such a case, both claims are before the revising barrister, who does not alter the description of the qualification, but strikes out the bad claim and retains the good. This is the only

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interpretation which I am able to give to sub-s. 13: it either has no meaning, or it applies to the making of an entirely new claim under such circumstances as I have suggested. That, however, is not material to the present case, and does not affect the view taken by the Court of Appeal in *Foskett* v. *Kaufman* (1) as to the meaning of sub-s. 13 when applied to and read with sub.-s. 12. The decision in that case really determines the present one, and the revising barrister had, therefore, no power to make the amendment which he did. In the case of occupation lists he would have no power to amend the description of qualification in the third column in the absence of a declaration under s. 24; and in revising the ownership lists he has no power to alter the qualification in the third column at all, the only way to set such a mistake right being by the making within the proper time of a fresh claim. In dealing with the ownership lists the power of the revising barrister to make amendments cannot be exercised to the extent of inserting a perfectly new qualification in place of the one already there. I am, therefore, of opinion that the judgment of the majority of the Divisional Court was right and must be affirmed.

LOPES, L.J. This case raises an important question as to the revising barrister's power of amendment under s. 28 of the Act of 1878 when revising the ownership lists. That section, with all its sub-sections, is incorporated in the Act of 1885, and it becomes important to consider the true meaning of sub-ss. 12 and 13. After careful consideration, I have come to the conclusion that they empower a revising barrister to correct an insufficient or inaccurate statement of qualification in the third column, provided such correction does not involve a change or alteration of the qualification as it appears in the list. That conclusion is in accordance with the decision of this Court in *Foskett* v. *Kaufman*. (1) What is the effect of that upon a voter who has misdescribed his qualification in the third column? He must make a new claim; for the Act of 1885, which for the purpose of the registration of ownership voters incorporates s. 28 of the Act of 1878, does not incorporate s. 24 of that Act, and it is therefor

(1) 16 Q. B. D. 279.

not competent to the revising barrister to receive the declaration contemplated by that section—a section which seems to apply entirely to occupation voters. Applying that interpretation of the law to the facts of the present case, in the third column the qualification was described as being freehold, while, in fact, it was leasehold; and it follows that the amendment made by the revising barrister would have the effect of entirely altering the qualification inserted in the third column. This he could not do, and the decision of the Divisional Court was therefore right.

KAY, L.J. The list which was being revised was in the form given in the Registration Order of 1889, in which the third column is headed, "Nature of Qualification." This column was filled up with the words "freehold house"—a description which the revising barrister altered to "leasehold house." Had he the power to make such an alteration? The answer to that question depends on the construction of two statutes, the Acts of 1878 and 1885. Sect. 1, sub-s. 2, of the Act of 1885 provides that certain sections of the Act of 1878 are to apply to the registration of ownership voters in parliamentary counties in like manner as to the registration of occupation voters, and among the specified sections, s. 28 of the Act of 1878 is, but s. 24 of that Act is not, included. The latter section (s. 24) provided that where a person was entered on any list of voters for a parliamentary borough which was subject to revision, the nature of whose qualification was not correctly stated in the list (I am reading the section shortly), he might make a declaration before a justice of the peace, which the revising barrister should receive for the purpose of correcting the list. Then by s. 28, sub-s. 1, the revising barrister is to correct any mistake proved to have been made in any list; and if the section stopped there, the revising barrister would have had a right to make the alteration which he did in the present case; but, after a number of sub-sections, providing for the mode of correction, we come to sub-s. 12. That sub-section clearly does not apply to the present case; and then comes sub-s. 13. Now, reading those three sub-sections together, we find that by sub-s. 1, the revising barrister has power to correct any mistake in any list; but s. 13 provides

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that, "except as therein provided," he is not to change one qualification into another—that is a limitation on his power of amendment. Further, on reading those sub-sections into the Act of 1885 (omitting, of course, all reference to s. 24), the result is this—that as s. 24 does not apply, there is no power in the voter to make a declaration, and that, therefore, the power of the revising barrister to make amendments is still further limited than it was in the Act of 1878; for as the voter cannot make the declaration, the revising barrister has less power than he has under the Act which enables him to make such an alteration after receiving the statutory declaration from the voter. It is plain, therefore, that the revising barrister in making the alteration which he did was wrong.

Our decision is entirely consistent with that in *Foskett* v. *Kaufman* (1), which was a case not under the Act of 1885, but under that of 1878, and which decided that under that Act a revising barrister had no power to alter the description of the qualification in the third column by inserting another and wholly different qualification, unless a declaration had been made by the voter under s. 24. That decision I entirely agree with and adopt; and, applying it to the present case, it is clear that as the declaration cannot be made by the voter, the revising barrister's power of amendment is insufficient to enable him to do what he has done.

I entirely agree with the Master of the Rolls, that where the voter sends in a new claim in time no question of alteration arises: there are two claims for the revising barrister to choose between, and he takes that which he thinks right.

Appeal dismissed. (2)

Solicitors for respondent: *Philpot & Son, for Potts & Roberts, Chester.*

Solicitors for appellant: *Robbins, Billing & Co., for Nicholls, Harris, & Lindsell, Altrincham.*

(1) 16 Q. B. D. 279.

(2) There was a second appeal of *Robinson* v. *Potts* from the same revising barrister. *Plant* v. *Potts* only was argued in the Divisional Court, and *Robinson* v. *Potts* only in the Court of Appeal; but as the point raised in both was identical, and only one judgment was given, separate reports of the two cases are unnecessary.

W. J. B.

HARRIS *v.* PHILLIPS. 1890 *Nov.* 10.

*Parliament—Registration—County Vote—Freehold Qualification—Claim of Members of Chapter to Vote in respect of a Share in the Freehold Lands of Chapter—*4 *&* 5 *Vict. c.* 39, *s.* 25—*Registration Act,* 1843 (6 *&* 7 *Vict. c.* 18), *s.* 74.

The canons residentiary of a cathedral who are entitled under 4 & 5 Vict. c. 39, s. 25, to a fixed share in the corporate revenues, have no freehold qualification in respect of shares in the freehold lands of the corporation.

Case stated by the revising barrister for the Sleaford Division of Lincolnshire.

Objection was taken to the retention on the register of the names of three canons residentiary of the cathedral of Lincoln, who were described respectively as possessing a freehold qualification in respect of "a house and land" in the parish of Wellingore in the division.

By s. 25 of 4 & 5 Vict. c. 39, an Act relating to the Ecclesiastical Commissioners for England: "In the cathedral church of Lincoln . . . . the whole divisible corporate revenues shall from time to time be divided into six shares, and two of such shares shall be paid to the dean, and one of such shares shall be paid to each canon." The revising barrister held that the dean and chapter were trustees and that the canons residentiary were respectively corporations sole, and as such "cestuis que trust in possession of the rents and profits" of land within the meaning of s. 74 of the Parliamentary Registration Act, 1843 (1), and were therefore qualified, and disallowed the objection.

The objector appealed.

Asquith, Q.C. (*R. S. Wright,* with him), for the appellant. The objection is valid. The land is vested in the corporation aggregate of which the canons are members. As individuals they

(1) By s. 74 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18): "No trustee of any land or tenements shall . . . have a right to vote . . . for or by reason of any trust estate therein; but the cestui que trust in actual possession of or in receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same, notwithstanding such trust."

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have no legal or equitable estate such as is necessary to constitute a qualification for the franchise.

[He referred to *Acland* v. *Lewis*. (1)]

J. C. Carter, for the respondent. The statutory right of each of the canons to receive a share of the divisible corporate revenue of the chapter gives him an equitable estate in the lands of the chapter. Each canon is therefore a "cestui que trust in possession of the rents and profits" of land within the terms of s. 74 of the Registration Act, 1843.

[He referred to *Ford* v. *Harrington*. (2)]

GRANTHAM, J. I am of opinion that the revising barrister was wrong. The interest of the claimants in this property as members of a chapter is not a legal qualification for the franchise. If it were otherwise, fellows of colleges would be entitled to a vote in respect of a share in the estates of their colleges. In *Ford* v. *Harrington* (2) members of a chapter were held to be qualified to vote in respect of houses; but nothing can be more conclusive against the claimants than that decision, the very ground of which was that the canons occupied not as members respectively of a corporation aggregate, which is the position of the claimants, but each as being himself a corporation sole. The appeal will, therefore, be allowed.

VAUGHAN WILLIAMS, J. I am of the same opinion. I think that the claimants, far from possessing a freehold qualification, have no interest whatever in the land itself, but only an interest in the profits arising from it.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitor for the appellant: *J. Hextall.*

Solicitors for the respondent: *Peacock & Goddard.*

H. D. W.

(1) 30 L. J. (C.P.) 29. (2) Law Rep. 5 C. P. 282.

SUTTON *v.* WADE.
GALE *v.* OVEREND.
MOORE *v.* ATKINSON.

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Nov. 7.

Parliament—Notice of Objection to Overseers—Form—Place of Signature—Local Government Act, 1888 (51 & 52 *Vict. c.* 41, *s.* 76, *sub-s.* 7)—*Registration Order*, 1889, *Sched.* 2, *Form* (1), *No.* 1; 48 *Vict. c.* 15, *s.* 18.

A notice of objection given to overseers under the Registration of Electors Acts, and the Registration Order, 1889, Sched. 2, Form (1), No. 1 is not rendered invalid by the mere fact that the signature of the objector precedes the names of the voters objected to instead of being placed after them as prescribed in the form.

SUTTON *v.* WADE.

CASE stated by the revising barrister for the city of Norwich.

A notice of objection to the name of the appellant being retained on Division 1 of the list of parliamentary electors and citizens was duly signed and served on him by the respondent.

The respondent also duly served on the guardians of the poor who, under the Norwich Corporation Act, 1889, s. 88, perform the duties of overseers of the parish of Norwich, a notice as follows:—

"Polling District, No. 1.

"Notice of objection to be given to Overseers.

"(Parliamentary and Local Government.)

"To the Guardians of the Poor of the Norwich Incorporation acting as and being Overseers of the Parish of Norwich.

"I hereby give you notice that I object to the names of the persons mentioned and described below being retained on the List No. 1, Division No. 1, as Parliamentary Electors for the Parliamentary City and County of the City of Norwich and as Citizens for the Municipal City and County of the same City.

"Dated this 18th day of August, 1890.

"William Arthur Wade,
"Of No. 136, Bull Close Road, Saint James, in the City of Norwich.

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"On Division 1 of List 1 of Parliamentary Electors and Citizens for Polling District No. 24 of the Parish of Norwich in the City and County of the City of Norwich.

Name of person objected to as described in the List.	Place of abode as described."

[Here followed seventeen names and addresses, including the name and address of the appellant.]

The whole of the notice was written and printed on the same side of a sheet of paper. The name of William Arthur Wade therein appearing was the signature of the respondent. The notice was not otherwise signed by him.

The name of the appellant was duly published by the guardians in the list of persons objected to.

It was contended by the appellant that the notice to the guardians was not a good notice of objection to his name, on the ground that the name did not appear in the body of the notice, and that, as the signature of the respondent there preceded the names of the appellant and of the other persons objected to, the notice was not signed at the foot thereof as required.

The revising barrister decided that the notice to the guardians was a good notice of objection, and, as it was proved that the appellant was not qualified to be on the list of electors, allowed the objection, and expunged the names of the appellant and other persons under similar circumstances from the list.

If the Court was of opinion that the notice was good, the list was to remain as revised.

R. S. Wright, for the appellant. The notice of objection is bad. By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 76, sub-s. (7), the instructions, precepts, notices, and forms under the Registration of Electors Acts may be altered by Order in Council, and the instructions, precepts, notices, and forms specified in any such Order in Council shall be observed and be valid in law. The Registration Order, 1889, issued under the above section, contains, in Sched. 2, a form (I.), No. 1 of notice of objection to be given to overseers. The place and name of the

person objected to is therein shewn to be in the body of the notice, and the place for the signature of the objector at the end. In *Toms* v. *Cuming* (1), Maule, J., said that the signature to a notice of objection must be at the bottom, and placed there by the objector himself. The names of the persons objected to are an essential part of the document; until they are inserted it does not become a notice; and unless they are in it before the objector signs it, he has not signed a valid notice. His signature is required to authenticate it. So likewise in the case of wills. If an objector could merely sign a form with a schedule which could be filled up by some other person afterwards, an inquiry would become necessary as to whether the names were inserted before or after he signed the paper. The form must be followed in order that such inquiries may be avoided. The requirements of the Registration Acts as to notices of objection must be strictly observed, as appears from the decisions in *Humphrey* v. *Earle* (2) and *Wood* v. *Chandler*. (3)

The position of the signature in the present notice is not a mere disregard of form which, by 48 Vict. c. 15, s. 18, is not of itself to invalidate it, but is a substantial departure which it would be impolitic to allow. In *Smith* v. *Holloway* (4) the objection to the notice which the Court held sufficient was only that the names of several persons were inserted.

Mattinson, for the respondent. Two notices of an objection must be given—viz., one to the voter, the other to the overseers. The first is most material, as it warns the person to whom objection is made, the second is merely supplemental. In the present case the notice to the voter was duly signed and served, and the question is only as to the notice to the overseers. By 6 & 7 Vict. c. 18, s. 7, as to counties, and s. 17 as to boroughs, every person on the lists of voters may object to any other person as not entitled to be on the list, and shall give a notice according to forms prescribed, or to the like effect, to the overseers, and also to the voter . . . and every notice of objection shall be signed by the person objecting. Those forms indicate that the signature is to be in the same place as that indicated in the present form,

(1) 7 M. & G. 88; 14 L. J. (N.S.) (C.P.) 67. (2) 20 Q. B. D. 294.
(3) 20 Q. B. D. 297. (4) Law Rep. 1 C. P. 145.

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and in *Smith* v. *Holloway* (1) the notice to the overseers given under 6 & 7 Vict. c. 18, s. 7, was: "I hereby give you notice that I object to the names of the persons mentioned and described below, being retained in the list," &c.—the names being in a schedule at the foot of the notice, and the Court held that there was a sufficient compliance with the statute. That case is in point. Decisions on the Wills Act do not apply, because it requires that the signature of the testator shall be at the foot or end of the will. Signature is required to a memorandum in writing within s. 17 of the Statute of Frauds; but it has been held that the name need not be at the foot.

[He was stopped.]

GALE *v.* OVEREND.

In this case, stated by the revising barrister for the borough of Leeds, a similar question was raised on notices of objection to "the names of the following persons" placed after the signature of the objector. The barrister held the notices invalid, and declined to amend. Erasures and interlineations appeared in some of the names in the schedules.

Asquith, Q.C., for the appellant.

The Court called on

Macaskie, for the respondent. The alterations may have been made after the date of the notice which is above them. The forms must be followed, or the notice of objection will be invalid. The 6 & 7 Vict. c. 18, s. 7, prescribing that notices shall be in a given form "or to the like effect," allows more latitude than the regulations of 1889; yet in a case where the notice was erroneously dated 1880, whereas it was given in 1883 and duly published, the Court, although considering the point "highly technical and beside the merits of the case," held the notice bad: *Freeman* v. *Newman* (2); and in *Smith* v. *Chandler* (3) the omission of a date from a lodger claim was held fatal. There is no authority for saying that a schedule of names may be placed after the signature of the objector. In *Smith* v. *Holloway* (1)

(1) Law Rep. 1 C. P. 145. (2) 12 Q. B. D. 373.
(3) 22 Q. B. D. 208.

the objection was to a county voter, and the form prescribed by s. 7 contains a schedule, whereas the form prescribed by s. 17 of that Act for objection to a borough voter does not. The object of the notice to the overseers is, first, to protect the voter against the loss of the notice directed to him, which may be served by mere posting and yet never reach him, and, secondly, that if the objector dies, some other objector may have an opportunity of reviving his objection under 41 & 42 Vict. c. 26, s. 27. The overseers must publish on the church doors the list of names objected to, and if it is removed, put up another one. By 6 & 7 Vict. c. 18, s. 46, an objector may be condemned to pay the costs of a frivolous objection ; but if he could shew that the name of the voter was inserted in the schedule to the notice after signature, the objector might escape liability. The appearance of some of the schedules in the present notices suggests that names have been inserted after the notice was signed. Some are out of alphabetical order. The legislature seem from the provision of forms to have intended to prevent discussions of fact before the revising barrister as to the state of the notice when signed.

Asquith, Q.C., for the appellant. The fact of the signature not being placed at the end of the schedule raises no question of fact for the barrister which could not have been raised also if the signature had been at the end. If the objector had signed his name at the bottom of the notice, other names might have been inserted afterwards. There is no provision that the names in the notice shall be in the handwriting of the objector. He may use a stamp for his signature, and illegibility will not vitiate it. Notice has been given in the form prescribed "or to the like effect," and it is signed, and no more is necessary. In *Jones* v. *Jones* (1) it was held that a notice of objection need not be dated.

MOORE *v.* ATKINSON.

In this case, stated by the revising barrister for the borough of Whitehaven, a similar question was raised on notices of objection to the "names of the persons mentioned and described

(1) Law Rep. 1 C. P. 140.

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below," and placed in a schedule after the signature of the objector.

The revising barrister held the notices bad.

Mattinson, for the appellant, relied on his previous argument.

Warr, for the respondent, contended that the prescribed forms must be followed, and that the Courts had required strict adherence to them in *Humphrey* v. *Earle* (1) and *Smith* v. *Chandler*. (2)

GRANTHAM, J. We are all of opinion that in these cases the form in which the objections were sent to the overseers was in sufficient compliance with the form set out in the Registration Order, 1889, and consequently that the notices were good. In the first case the revising barrister was right, in the two others wrong. The cases are not without importance, because it is important that the order of procedure in registration should be observed, and that all notices of objection should be properly given to carry out the object of the legislature. We have first to bear in mind that notice is to be given to the person objected to, and unless the objector can shew that he has done everything required by the Act with respect to that notice, the objection would be bad. But, having done that, the Act requires that he should inform the overseers, who have to prepare the lists and require to know what objections are to be taken, and may themselves have objections. Therefore notice of objection must be given to the overseers and signed by the objector. Now in *Trotter* v. *Walker* (3) the signature to a notice of objection was so illegible that a person unacquainted with the objector's handwriting could not have deciphered it; but the Court of Common Pleas held the notice valid, saying: "If the sole object of the statute was merely to authenticate the document, the signature was undoubtedly sufficient." The signature is to authenticate the document containing the names sent to the overseers. That being the object of the statute, I fail to perceive the suggested analogy to the requirements of the Wills Act. The importance of the signature to a will is beyond comparison with that of the signature to a mere notice to

(1) 20 Q. B. D. 294. (2) 22 Q. B. D. 208. (3) 13 C. B. (N.S.) 30.

an overseer of objection to the persons whose names are stated. Nevertheless, the statute must of course be reasonably complied with, and even if we had not the power in 48 Vict. c. 15, s. 18 —which not only allows us to disregard technical flaws, but declares that a "disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing"—we ought not to entertain an objection of this kind to the form of notice; because, having regard to the whole of the notice now before us, I can see nothing which creates any real doubt or difficulty in carrying out the object of the legislature and ascertaining the persons who had been objected to. The form in the registration order, 1889, gives an example of an objection to only one individual; but it has been held that, as there is to be a list of those objected to, their names may all appear in one notice. Then what difference does it make whether the objector says in his notice that he objects to the names "following," or to the names "above" written? The same observations as to insertion and alteration of names might be made in either case. The only objection here is that the signature was not at the bottom of the document. But, as it is not necessary that the names of the persons objected to should be filled in by the objector, suppose he had signed the notice at the bottom, leaving, however, a space above his signature, so that any name accidentally omitted from the list of persons objected to might be filled in before the notice was issued, then the same dangers which have been suggested in the present cases would arise. The object of the legislature is attained by a correct list given to the overseers of the persons who individually had had notices of objections served upon them. Under these circumstances, I think that we are bound to give effect to these notices, and that if we did not we should fail to obey s. 18 of 48 Vict. c. 15; and I am glad to think that we are not bound to give effect to the technical objection.

VAUGHAN WILLIAMS, J. I am of the same opinion; but inasmuch as our decision is not only important to the persons named in the cases now before us, but may also be important with respect to the future practice as to giving notices of objection,

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Williams, J.

I prefer to state my own reasons. The objection to these notices is that they are not in the form which has been prepared under an Order in Council, in pursuance of the provisions of the statute. If the departure from that form is a departure which is a mere departure from the form in the instructions, then by the very terms of s. 18 of 48 Vict. c. 15, we ought not to give any effect to that departure, because that section ends by declaring that "a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." The only question, therefore, which we have to decide is whether or not the signature to these notices of objection above the names referred to is, in these particular cases which are before us, mere departure from the form or instruction, or whether it is a substantial departure so as to make the notice given substantially different from that provided for by the form and instruction. It is plain that the form provided requires that the person giving the notice of objection shall authenticate it by his signature, and it seems to me that the objection to these particular notices of objection is, in substance, that they are not properly authenticated. For my part, if I thought that the notice of objection was not properly authenticated, I should not hold that to be a mere departure from the form or instruction, but a matter of substance, for I should say that in every case if the notice of objection is not properly authenticated by the signature of the objector, that notice of objection would be bad. I do not think that on this question, whether the authentication of the signature of the notice of objection given to the overseers is good or not, it is a matter of the slightest importance or relevance whether there has been a particular notice given to the voter himself. In my opinion, the fact that there has been a particular notice to the voter himself does not do away with the necessity that the notice to the overseers should be properly authenticated. Something has been said in argument as to what was the purpose of giving notice to the overseers. Whatever the purposes may have been, I cannot entertain a doubt that one of the purposes of giving notice to the overseers was that the overseers should put up the notice on the church doors, and, if necessary, that that notice of objection should serve to give notice of objection to the voter and other

persons. The present system of registration and of notices of objection to the overseer and to the voter was established by the Reform Act, in which it will be found that in the very section which requires the notice to the overseer and the notice to the voter, provision is made that the overseer on receiving the notice shall publish it on the church doors. I think, therefore, that in determining whether or not the notice has been properly authenticated, we should disregard altogether the question whether or not there has been any notice given to the individual voters. Now, although taking all the circumstances into consideration, the balance of my opinion might probably be that this was a good notice, yet if the notice was in such shape as to raise a question of fact about the authentication which would not and could not have been raised if the statutory form had been followed, I should say that the notice was bad. For example, suppose authentication by initials or indorsement, I should say in each case that a question of fact would be raised which would never have been raised if the statutory form had been followed. I look at these notices to see whether any question of fact could be raised which could not have been raised if the statutory form had been followed. Now, as I understand, it is said that a question could be raised because, although the notice of the objector is, "I hereby give you notice that I object to the names of the persons mentioned and described below" being retained on the list, yet as the signature precedes those names there is not that authentication which there would have been if the signature had followed the names. If I thought that were so, I should consider the notice bad. But, on looking at the notices themselves, it does not seem to me that there could be any further or other question of the authentication of these names than there would have been if the signature had followed the names instead of preceding them. Therefore, I agree with the rest of the Court that in these particular cases which are before us, these notices are good notices of objection. I must not be taken in any way to be laying down the proposition that when the signature is of such a character as to render the authentication of the document difficult the notice would nevertheless be good.

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LAWRANCE, J. I am of the same opinion. I agree with the judgment of my brother Grantham. I think that there has been substantial and almost actual compliance with the Act of Parliament and the requirements of the form.

Sutton v. *Wade*:—Solicitor for appellant: *C. S. Gover.*

„ „ Solicitors for respondent: *Oldman & Clabburn.*

Gale v. *Overend*:—Solicitors for appellant: *Paterson, Snow, Bloxam, & Kinder.*

„ „ Solicitors for respondent: *Ford & Warren.*

Moore v. *Atkinson*:—Solicitor for appellant: *J. E. Shaw.*

„ „ Solicitor for respondent: *Helder & Roberts.*

J. R.

C. A.

Dec. 4.

[IN THE COURT OF APPEAL.]

BOLTON *v.* BUCKENHAM.

Principal and Surety—Giving of Time—Covenant to pay Mortgage Debt—Covenant in Consolidated Mortgage to pay at later Date—Assignment of Benefit of Covenants in original Mortgage Deed.

By a covenant in a mortgage deed, dated September 4, 1857, the mortgagor covenanted and the defendant covenanted as his surety for the payment of the mortgage debt of 450*l.* to the mortgagee on March 4, 1858. By a deed, dated December 15, 1884, the above-mentioned mortgage and various other mortgages, including other property, given by the mortgagor were consolidated, the plaintiff advancing the total sum of 3200*l.* for payment to the various mortgagees of the amounts of their respective debts, and taking assignments of such debts and the mortgaged properties, "with the full benefit of the covenants" contained in the respective mortgage deeds; and the mortgagor covenanted with the plaintiff for the payment of 3200*l.* on January 19, 1885. The defendant was not a party to such last-mentioned deed:—

Held, that the covenant in that deed necessarily implied that the principal debtor could not be sued for the 450*l.* due under the covenant in the deed of 1857 before January 19, 1885, and, consequently, there had been a giving of time to the principal debtor by which the defendant as surety was discharged from liability.

APPEAL from the judgment of Day, J., at the trial without a jury.

The action was upon a covenant to pay the sum of 450*l.*, and the defence was that the defendant had covenanted as surety for

one John Clarke Buckenham, and that her liability on the covenant had been discharged by time having been given to the principal debtor.

The facts, so far as material, were in substance as follows:— By a mortgage deed, dated September 4, 1857, John Clarke Buckenham and the other parties, of whom the defendant was one, having interests in certain hereditaments, mortgaged such hereditaments to one Cooper, to secure repayment of an advance of 450*l.* made by Cooper to John Clarke Buckenham, with interest at 5 per cent. per annum. The deed contained a joint and several covenant by John Clarke Buckenham and the other mortgagors for the payment of the mortgage debt of 450*l.* on March 4 then next ensuing, with interest at the rate of 5*l.* per cent. per annum. This was the covenant upon which the action was brought. There was also the usual covenant for further assurance. John Clarke Buckenham having effected other mortgages of his interest in the hereditaments before mentioned, and also of other property, to secure repayment of divers advances, ultimately all the mortgages, including that of September 4, 1857, were consolidated by a mortgage dated December 15, 1884, under which the plaintiff was the mortgagee. By a deed of that date, after reciting that the said John Clarke Buckenham had applied to the plaintiff to advance the total sum of 3200*l.* in order to pay off the before-mentioned mortgages upon having the said mortgages transferred to him, "and upon having repayment thereof with interest further secured in manner hereinafter appearing," the various mortgagees respectively, in consideration of the payment of the amounts of their respective debts, conveyed to the plaintiff such debts, "and the full benefit of the covenants and other powers and provisions contained" in their respective mortgage deeds for securing the payment of the principal sum and interest, and "of all securities for the same." The various mortgaged properties were then conveyed to the plaintiff subject to a proviso for redemption upon the repayment of the total amount of 3200*l.* advanced by him; and John Clarke Buckenham covenanted to pay to the plaintiff the sum of 3200*l.* (being the total amount of the various mortgage debts consolidated) on January 19, 1885, with interest thereon in the

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meantime at the rate of 6*l.* per cent. per annum. There was a proviso for reduction of interest to 5*l.* per cent. if punctually paid. The defendant was not a party to the deed of December, 1884.

The learned judge was of opinion that the assignment of the benefit of covenants in the original mortgage deeds contained in the deed of 1884 had reference to collateral covenants, e.g., for further assurance, not to the covenant for payment of the mortgage debt, and that the deed of 1884 had the effect of giving time to the principal debtor. He, therefore, gave judgment for the defendant.

Haldane, Q.C., and *Lyon*, for the plaintiff. The deed of December 15, 1884, did not give time to the principal debtor. The deed expressly assigns the benefit of the covenant under the deed of 1857. There is nothing in law to prevent the covenant to pay the sum of 450*l.* on March 4, 1858, from continuing to exist concurrently with the covenant to pay the consolidated sum of 3200*l.* on January 19, 1885. The latter is a further security. There can be no question of merger, for both are specialties; and, so far from one covenant being intended as an accord and satisfaction for the other, the first covenant is expressly assigned. The plaintiff might have sued the principal debtor at any time for the 450*l.* on the covenant in the deed of 1857. The plaintiff has taken a transfer of the original debt of 450*l.* and kept it alive, with all the remedies and securities for it; and he has also taken, as a further security for the debt, as part of a larger debt, the second covenant. The recital in the deed shews that the debt is "to be further secured in manner thereinafter appearing," but the old debt is kept alive.

[They cited *Munster and Leinster Bank* v. *France* (1); *Twopenny* v. *Young* (2); *Drake* v. *Mitchell.* (3)]

Channell, Q.C., and *Jason Smith*, for the defendant, were not called upon.

LORD ESHER, M.R. From the first of the deeds before us it appears that there was an advance of 450*l.* upon the security of

(1) 24 L. R. Ireland, 82. (2) 3 B. & C. 208.

(3) 3 East, 251.

certain property, and a covenant by the mortgagor, John Clarke Buckenham, to repay the money advanced upon a certain day. The defendant also entered into a covenant for the payment of the money; but she had no interest in the advance of 450*l.*, and clearly covenanted only as surety for the person to whom the advance was made. A covenant for payment of a loan on a certain day, though in the affirmative, necessarily contains a negative by implication, viz., that the lender of the money is not to sue for it before that day. Then, with regard to the second deed, it is clear upon the deed that the mortgage debt of 450*l.* under the first deed is included in the larger sum of 3200*l.* secured by the second deed. If, therefore, there is an implication contained in the second deed that the larger sum shall not be sued for till a certain later date, there is necessarily an implication that the 450*l.* shall not be sued for till that date. Such an implication necessarily arises in the second deed from the covenant to pay the sum of 3200*l.* on a subsequent date. The second covenant appears to me to swallow up the first. It is inconsistent with it. But it is said that the benefit of the covenant by the principal debtor in the first deed is in terms reserved by the second. If that be so, I do not think it makes any difference. I do not think a person can in a deed reserve rights which, by other terms of the same deed, he has necessarily given up. The words of reservation are in such case idle words. It seems to me clear for these reasons that the surety, who was no party to the second deed, has a defence to the action on the ground that time was given to the principal debtor. Therefore, the appeal must be dismissed.

LOPES, L.J., concurred.

KAY, L.J. I am of the same opinion. The first of these deeds, which was executed in 1857, was a mortgage of certain property to secure a sum of 450*l.* In 1884 a deed was executed by which that mortgage and other mortgages, some of which were of other subject-matters, were consolidated, and the various mortgage debts were added together so as to form an aggregate debt. Reliance was placed on the fact that this deed,

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by a recital, purported to give further security. But it is obvious that the debt of 450*l.* was further secured by this deed because it was made part of a larger sum secured by the consolidated mortgage upon the same and other properties. So that the words "further secured" are sufficiently satisfied without implying from them that a further covenant was to be given in addition to the former covenant. The deed of 1884, no doubt, in terms assigned the old mortgage debts and the benefit of the covenants in the former deeds. We have, however, to consider the effect of the deed as a whole. The question is, what is the effect of taking a new covenant by which the consolidated mortgage debt, and therefore, of course any sum which forms part of it, is made payable on a later day. The difficulty of the argument was to make out that such a covenant is consistent with keeping alive the old covenant. It seems to me clear that it cannot be so, if by necessary implication the new covenant involves that the debt is not to be sued for till the arrival of such later day. I agree that it is impossible to read the new covenant without seeing that it contains such a negative implication. As soon as that conclusion is arrived at, it becomes obvious that the new covenant is inconsistent with the old. The result is that the new covenant is in effect equivalent to a covenant not to sue till a later period, and therefore time has been given; and, as there is no reservation of rights against sureties, the defendant has been thereby discharged.

Appeal dismissed.

Solicitor for plaintiff: *A. B. Chubb.*

Solicitors for defendant: *Gilbert Robins, for Salmon & Son.*

E. L.

[IN THE COURT OF APPEAL.]

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Nov. 20, 21,
Dec. 19.

SERRAINO & SONS *v.* CAMPBELL and Others.

Ship—Bill of Lading—Incorporation of Conditions of Charterparty into Bill of Lading.

Goods were shipped under a charterparty and bill of lading, the bill of lading providing that the goods were to be delivered at the port of discharge, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted, unto order or to assigns, they paying freight for the said goods, and all other conditions as per charter, with average accustomed." In the charterparty were the same exceptions, followed by these words: "Negligence clause, as per Baltic Bill of Lading, 1885." Amongst the perils excepted by the Baltic Bill of Lading, 1885, were "strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Owing to the negligence of the master, the ship was stranded and the goods were lost. The plaintiffs, who were indorsees of the bill of lading, but strangers to the charterparty, sued the shipowners for the loss of the goods:—

Held, that the words, "all other conditions as per charter," did not incorporate into the bill of lading the exception of "stranding occasioned by the negligence of the master," and that the shipowners were liable to the plaintiffs.

Decision of Huddleston, B. (25 Q. B. D. 501) affirmed.

Russell v. *Niemann* (17 C. B. (N.S.) 163) is not overruled by *Gray* v. *Carr* (Law Rep. 6 Q. B. 522).

Appeal against a decision of Huddleston, B. (1)

The action was brought by the plaintiffs, as indorsees of a bill of lading, and owners of a cargo of coal intrusted to the defendants, as owners of the ship *John Banfield*, for delivery at Trapani, in Sicily, to recover damages from the defendants for the loss of the coal, by reason of the stranding of the vessel on the coast of Sicily. The jury found that the loss was due to the negligence of the master of the vessel. The coal was shipped by Fisher, Renwick & Co., under a charterparty in which they were described as "agents for the charterers." The learned judge held, on the evidence, that Fisher, Renwick & Co. were principals, and not agents for the plaintiffs, so that the plaintiffs were not directly bound by the charterparty. The charterparty was in the ordinary

(1) 25 Q. B. D. 501.

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form, and it contained, in print, the following exceptions: "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage," and there was added, in writing, at the end, "Negligence clause, as per Baltic bill of lading, 1885." The bill of lading provided that the coals shipped by the *John Banfield*, by Fisher, Renwick & Co., were to be delivered at the port of Trapani, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter, with average accustomed." The negligence clause in the Baltic Bill of Lading, referred to in the charterparty, provided that "strandings and collisions, and all losses and damages caused thereby," were to be excepted from the liability of the shipowner, "even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The defendants contended that the effect of the words, "all other conditions as per charter," in the bill of lading was to incorporate into it the negligence clause contained in the Baltic Bill of Lading, and that, consequently, the defendants were absolved from liability, though the stranding of the vessel was due to the negligence of the master. The learned judge held that the words, "all other conditions as per charter," had not this effect, and that the defendants were liable, and he gave judgment for the plaintiffs.

The defendants appealed.

Nov. 20, 21. *French*, Q.C., and *Joseph Walton*, for the defendants. The question is whether the clause in the charterparty, providing that the shipowners shall not be liable for negligence, is incorporated into the bill of lading. The question has been settled in the defendants' favour by a series of authorities. The principle laid down in *Gray* v. *Carr* (1) and *Porteus* v. *Watney* (2) is, that, by the use in the bill of lading of such words as "all other conditions as per charter," all the conditions of the charterparty

(1) Law Rep. 6 Q. B. 522. (2) 3 Q. B. D. 534.

which are not inconsistent with the rest of the bill of lading are to be incorporated, not merely those connected with the receipt of the goods, and which are to be performed by the consignee, and are ejusdem generis with the payment of freight. *Gardner* v. *Trechmann* (1) is to the same effect. In *Gullischen* v. *Stewart Brothers* (2) the clause then in question, the cesser of liability clause, was plainly inconsistent with the bill of lading, and would have rendered it almost a nullity. *Russell* v. *Niemann* (3) is distinguishable, because the collocation of the words was not the same as here; or, if not, it is inconsistent with *Gray* v. *Carr* (4) and *Porteus* v. *Watney* (5), and must be taken to be overruled. In the present case there is nothing in the Baltic clause inconsistent with the provisions of the bill of lading as to excepted perils. It merely adds another to the list of those perils. Such an addition must, no doubt, always be inconsistent in this sense, that the effect of the document with it will be different from that which it would have been without it; but that is not the sense in which the term "inconsistency" is used in this connection.

[LOPES, L.J. Is it not inconsistent to repeat expressly all the excepted perils mentioned in the charterparty but one, and then to incorporate them all by reference?]

It might as well be said that the clause is inconsistent with the provisions of the charterparty itself with regard to excepted perils. The learned judge below proceeded on a case of *Taylor* v. *Perrin* (6), in the House of Lords; but the observations of Lord Blackburn and Lord O'Hagan, on which he relied, were entirely obiter, the case being actually decided on other grounds; and such obiter dicta, even in the House of Lords, cannot overrule the decisions of the Exchequer Chamber and the Court of Appeal, in *Gray* v. *Carr* (4) and *Porteus* v. *Watney*. (5) The Scotch case, *Delaurier* v. *Wyllie* (7) bears on the question, and it is in favour of the plaintiffs. In *Hamilton* v. *Mackie* (8) the rule laid down by this Court was, that, when a bill of lading contains

(1) 15 Q. B. D. 154.
(2) 13 Q. B. D. 317.
(3) 17 C. B. (N.S.) 163.
(4) Law Rep. 6 Q. B. 522.
(5) 3 Q. B. D. 534.
(6) Not reported.
(7) 17 Court Sess. Cas. (4th Series), 167.
(8) 5 Times L. R. 677.

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the words, "all other conditions as per charterparty," "the conditions of the charterparty must be read verbatim with the bill of lading, as though they were there printed in extenso; and then, if it was found that any of the conditions of the charterparty were inconsistent with the bill of lading, they were insensible and must be disregarded." Applying that rule here, there will be no inconsistency in a further limitation of the shipowners' liability. The effect will only be to enlarge the exceptions of the bill of lading. That part of the Baltic clause which relates to negligence is incorporated into this bill of lading. The point was not actually decided in *Taylor* v. *Perrin*. (1) In *Gray* v. *Carr* (2), Bramwell, B., said, that the bill of lading must be construed in connection with the charterparty and the surrounding circumstances, and "it must be borne in mind that the defendants were consignees of the whole cargo." Here the plaintiffs were consignees of the whole cargo. It must be borne in mind that the bill of lading was a printed form, and that the words in question were inserted in writing. The plaintiffs really had notice of all the terms of the charterparty, and adopted it as their own.

Gorell Barnes, Q.C., and *Lawson Walton, Q.C.*, for the plaintiffs. The plaintiffs in no way attempt to impugn the decision in *Gray* v. *Carr* (3); but the effect of it has been misapprehended by the defendants. *Gray* v. *Carr* (3) is not a decision that such words as are here found in the bill of lading incorporate into the bill of lading all the conditions contained in the charterparty. The difference between the judges in *Gray* v. *Carr* (3) was as to the extent to which those conditions were incorporated into the bill of lading. All the judges agreed, that only those conditions were incorporated which were to be performed by the consignee of the goods. The object of the introduction of these words into bills of lading was, to make the consignee liable to pay demurrage, which it had been held that he was not liable to pay under the old form of bill of lading: *Smith* v. *Sieveking*. (4) The question in *Gray* v. *Carr* (3) was, what lien the shipowner had on the goods as against the consignee; to

(1) Not reported.
(2) Law Rep. 6 Q. B., at p. 547.
(3) Law Rep. 6 Q. B. 522.
(4) 4 E. & B. 945; 5 E. & B. 589.

what extent was the consignee liable for demurrage; and on this point there was a difference between the judges. In all the other cases (with the exception of *Hamilton* v. *Mackie* (1), where it was attempted to import into a bill of lading an arbitration clause contained in the charterparty) a similar question has arisen. The words relied upon occur in the second part of the bill of lading. The first part deals with the obligations of the shipowner; the second deals with that which is to be done by the consignee of the goods. The words now in question have for twenty years been construed by every judge as applying only to what is to be done upon the delivery of the goods to the consignee. That is plain from *Gray* v. *Carr* (2): the Court of Exchequer Chamber certainly did not say that all the conditions of the charterparty were to be imported into the bill of lading. Willes, J., was a party to that decision, and it is not probable that he intended to overrule his own previous decision in *Russell* v. *Niemann* (3), when he made no reference to it. That case is exactly in point, and it governs the present case. The effect of the words in question is, to import into the bill of lading such conditions only of the charterparty as from their nature are to be performed by the consignee, involving, of course, the correlative obligations of the shipowner. *Russell* v. *Niemann* (3) was expressly approved by the House of Lords in *Taylor* v. *Perrin*. (4) The other cases—*Porteus* v. *Watney* (5); *Gullischen* v. *Stewart Brothers* (6); *Gardner* v. *Trechmann* (7); *Hamilton* v. *Mackie* (1); *Smith* v. *Sieveking* (8)—are really in favour of the plaintiffs' construction of the words; and so is *Delaurier* v. *Wyllie* (9), a decision of twelve Scotch judges, in which *Gray* v. *Carr* (2) was fully considered.

[KAY, L.J. Can any reason be suggested why the shipowners' contract with the charterer should contain different exceptions from those which are contained in their contract with the consignees?]

They have chosen to make different contracts. The introduction

(1) 5 Times L. R. 677.
(2) Law Rep. 6 Q. B. 522.
(3) 17 C. B. (N.S.) 163.
(4) Not reported.
(5) 3 Q. B. D. 534.
(6) 13 Q. B. D. 317.
(7) 15 Q. B. D. 154.
(8) 4 E. & B. 945; 5 E. & B. 589.
(9) 17 Court Sess. Cas. (4th Series), 167.

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of those exceptions into the bill of lading would involve an absolute contradiction. The shipowners' contract to deliver the goods is an absolute contract, subject only to the exceptions which are expressed in the bill of lading, and the defendants are endeavouring to introduce another exception, which will excuse them from using due care in one case.

French, Q.C., in reply. *Gray* v. *Carr* (1) is absolutely inconsistent with the reasoning in *Russell* v. *Niemann* (2); that reasoning is supported by *Porteus* v. *Watney*. (3) The only logical result is, that all the conditions of the charterparty must be read into the bill of lading, so far as they are consistent with the nature of such a document. The negligence clause is not a condition which has to be performed by the one party or the other; it has to be submitted to by them both.

Cur. adv. vult.

Dec. 19. LORD ESHER, M.R. The plaintiffs are the consignees of goods under a bill of lading, and they sue the defendants, the shipowners, for damages for non-delivery of the cargo in accordance with the terms of the bill of lading. The defendants allege that the goods which were lost come within one of the exceptions of the shipowners from liability which were contained in the bill of lading, and that, consequently, they are absolved from paying damages for the loss. The ship was stranded, and the goods were lost, owing to the negligence of the master or some of the crew. The exceptions of the shipowner from liability, which are to be found expressly stated on the face of the bill of lading, are these: "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever." Upon the construction of the bill of lading, if there were nothing more in it, the stranding of the vessel is not within the exceptions, and, unless there is something which adds to the exceptions, the plaintiffs are entitled to succeed in the action. The defendants rely on the subsequent words: "they paying freight for the said coals, *and all other conditions as per charter*;" and the defendants

(1) Law Rep. 6 Q. B. 522. (2) 17 C. B. (N.S.) 163.
(3) 3 Q. B. D. 534.

assert that these words bring into the bill of lading the exceptions from liability which are to be found in the charterparty. The charterparty is a somewhat peculiar one. It contains the same exceptions as those which are to be found in the bill of lading; and there are also these words: "Negligence clause, as per Baltic Bill of Lading, 1885." The Baltic Bill of Lading there referred to contains this exception, in addition to others: "Strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The question which we have to decide is, whether the defendants are right in saying that this exception is introduced by reference into the bill of lading. This can only be if the words, "and all other conditions as per charter," introduce the exceptions contained in the charterparty into the bill of lading. The interposition of similar words in a bill of lading has been the subject of much litigation; and in *Gray* v. *Carr* (1) a construction was put upon them by the Court of Exchequer Chamber. In that case the action was brought by a shipowner against the consignees of goods named in the bill of lading for demurrage at the port of loading, and for damages for detention beyond the demurrage days; and in all the subsequent cases which have been referred to, the action was brought by the shipowner against the consignee. In *Gray* v. *Carr* (1) an endeavour was made to restrict the meaning of the words, "and other conditions as per charterparty," by the words, "he or they paying freight," so as to make them apply only to matters ejusdem generis as the payment of freight. But the Court gave a larger interpretation to the words, and I think their decision really amounted to this, that the effect of those words was to introduce into the bill of lading all those conditions of the charterparty which would have to be performed by the receiver of the goods—that is, all the conditions which would operate as against the consignee. The subsequent cases, I think, only shew the practical mode of carrying out the principle of the decision in *Gray* v. *Carr* (1), which is this: you are first to read into the bill of lading all the conditions of the charterparty; if some of those

(1) Law Rep. 6 Q. B. 522.

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conditions are so large as not to be applicable to a bill of lading at all, they are to be treated as inconsistent, and must be struck out. This is the practical mode of carrying out the decision in *Gray* v. *Carr*. (1) The subsequent cases have not enlarged the decision in *Gray* v. *Carr* (1), but they have rather in some respects limited it. And I think in *Gray* v. *Carr* (1) the Court were really following what had already been laid down by Willes, J., in *Russell* v. *Niemann*. (2) That learned judge, in delivering the judgment of the Court of Common Pleas, said (at p. 177): "The second point is, whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words, 'and other conditions as per charterparty,' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz.—payment of freight—conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it is enough to say that the latter is the construction which we put upon these words." I do not think Willes, J., intended to limit the words to such matters as the payment of freight; but I think he meant to adopt the same construction which was adopted by the majority of the Court of Exchequer Chamber in *Gray* v. *Carr*. (1) After full consideration, I think that the words ought to be construed as meaning all those conditions of the charterparty which are to be performed by the consignee of the goods. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee—indeed, they are not conditions which have to be performed by any one. The perils of the sea are left unaffected, if there is no reference to them in the bill of lading; the excepted perils are those only which are mentioned in the bill of lading, and the exception of "strandings, &c.," is not contained in the bill of lading. There has been, no doubt, a great blunder, and it leads to an absurdity. The exception contained in the charterparty will be rendered useless, for the whole cargo will be carried under the bill of lading, in which that exception is not to be found. The result seems to be absurd; but I can

(1) Law Rep. 6 Q. B. 522. (2) 17 C. B. (N.S.) 163.

only come to the conclusion that there has been a blunder. The parties mistook the effect of their inserting in the bill of lading the words, "and all other conditions as per charter." What they really ought to have said was, "all perils excepted as per charter-party," or "negligence clause as per charterparty." They have said nothing which can have that effect. The consignee of the goods is entitled to look to the bill of lading alone for the conditions upon which the goods are carried, and he is not bound to look to anything else. The defendants are, therefore, liable to the plaintiffs for the loss. I think that our decision is quite consistent with *Russell* v. *Niemann* (1), and that it is not inconsistent with *Gray* v. *Carr*. (2) I agree with the decision of Huddleston, B., and I think that the appeal should be dismissed.

LOPES, L.J. The plaintiffs are indorsees of a bill of lading and owners of goods carried in the defendants' vessel, to be delivered at Trapani, in the island of Sicily, shipped by Messrs. Fisher, Renwick & Co. The goods were lost by the negligence of the defendants' servants, the vessel having been stranded at Mazzara. The charterparty, which was in the ordinary form, was signed by Fisher, Renwick & Co. "as agents for the charterers." It contained in print the usual exceptions, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage," and in writing, at the end, "Negligence clause as per Baltic Bill of Lading, 1885." It was contended on the part of the defendants, that the plaintiffs were parties to the charterparty, Fisher, Renwick & Co. being their agents, and, therefore, that the plaintiffs, as principals, were bound by all the terms of the charterparty. But, if they were not actual parties to the charterparty as principals, they were parties to the bill of lading, which, it was contended, incorporated all the provisions of the charterparty, including the Baltic clause. There was no evidence to shew that Fisher, Renwick & Co. were agents, apart from the fact that they so described themselves. The contract between Fisher, Renwick & Co. and the plaintiffs was contained in letters and telegrams, discussing the price, and

(1) 17 C. B. (N.S.) 163. (2) Law Rep. 6 Q. B. 522.

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concluded with a letter of December 12, in which Fisher, Renwick & Co. wrote: "Referring to telegrams exchanged between us, we confirm sale to your good selves of a cargo of large Newcastle steam coal at 19*s.* 6*d.* per ton c. i. f. Trapani," and the invoice was made out by Fisher, Renwick & Co. as vendors, and the plaintiffs as purchasers. This makes it clear beyond doubt that the contract was a contract of sale and purchase, and that Fisher, Renwick & Co. were principals in the charterparty, and that the plaintiffs were not directly bound by it. It was, however, contended, that the bill of lading incorporated all the provisions of the charterparty, including the Baltic clause. The bill of lading provided that the goods shipped by Fisher, Renwick & Co. were to be delivered at the port of Trapani, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted, *unto order or assigns*, they *paying freight* for *the said coals and all other conditions as per charter*, with average accustomed. The question is, whether the words, "all conditions as per charter," imported into the bill of lading the Baltic clause? The Baltic clause provided that "strandings and collisions, and all losses and damages caused thereby," were to be excepted, "even when caused by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner." As a general principle, it may be laid down that, when bills of lading are in the hands of strangers to the charterparty, either as original shippers or as indorsees to whom the property has passed, they shew the contract under which the goods are being carried, and the shipowner's claims, exemptions, and lien on the cargo, given by the charterparty, are not preserved as against such shippers or indorsees, except so far as those terms of the charterparty are expressly incorporated into the bill of lading. In *Russell* v. *Niemann* (1), one of the questions was, whether the exception contained in the bill of lading was expanded by the exception in the charterparty. The exception in the bill of lading was the "act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind

(1) 17 C. B. (N.S.) 163.

soever, excepted." The exception in the charterparty was the "act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, excepted." After the exception in the bill of lading were the words, "paying freight for the said goods, and all other conditions as per charterparty." Willes, J., in giving judgment, said: "We now proceed to give judgment on the second point, which is, whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words, 'and other conditions as per charterparty,' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight, *conditions to be performed by the receiver of the goods.* It is a mere question of language and construction, and we think it enough to say that the latter is the construction which we put upon these words." Here is a distinct decision of Willes, Byles, and Keating, JJ. If this case has not been overruled, and there is no other case inconsistent with it, it remains law, and governs the present case. It was suggested that *Gray* v. *Carr* (1) is inconsistent with it. It is not in any way inconsistent. *Russell* v. *Niemann* (2) was cited in argument, but was not referred to in any of the judgments. *Gray* v. *Carr* (1) was in the Exchequer Chamber, and was decided in 1871; *Russell* v. *Niemann* (2) in 1864. It is scarcely conceivable that Willes, J., who concurred in the judgment given by Brett, J., describing it as a judgment written with such fresh and accurate acquaintance with the mercantile and maritime law applicable to the subject, that he would not attempt to add anything to it, should have forgotten his previous decision which had been cited before him, or meant to overrule it, or thought the case he was then deciding inconsistent with it. *Russell* v. *Niemann* (2) is entirely in accordance with *Gray* v. *Carr.* (1) The question in *Gray* v. *Carr* (1) was, whether the shipowner's lien was preserved as against the holder of the bill of lading; whether the contract in the bill of lading, which the holder is presumably bound to perform, incorporated the terms of the

(1) Law Rep. 6 Q. B. 522. (2) 17 C. B. (N.S.) 163.

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charterparty as to the loading, as well as those which related to matters subsequent to the shipment. Great differences of opinion were expressed as to the effect of a bill of lading which made the goods deliverable "unto order, or to his or their assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred) for the said goods as per the aforesaid charterparty." The question was, whether this entitled the shipowner, as against the holders of the bill of lading, to the benefit of a clause in the charterparty, by which the owners were to have "an absolute lien on the cargo for all freight, dead freight, demurrage, and average," in respect of certain demurrage which had been incurred at the port of loading before the bill of lading had been granted. The Court of Queen's Bench, and a majority of the Exchequer Chamber, held that the clause entitled the shipowner to a lien for the demurrage at the port of loading, and that by the terms of the bill of lading this right was preserved against the consignees. On the other hand, Brett and Willes, JJ., held, that the words would be satisfied by making them apply to damages in the nature of demurrage for delay at the port of discharge. It will be observed that this decision in no way touches that in *Russell* v. *Niemann* (1), where it was held that the words "other conditions as per charterparty" did not include all the stipulations contained in the charterparty, but were limited to conditions ejusdem generis with those previously mentioned, viz., *conditions to be performed by the receiver of the goods.* It cannot be said that the Baltic clause is such a condition; it is not a condition to be performed by the consignees. The words "all other conditions" must be construed with reference to the preceding words, "paying freight for the coals," and include only such conditions as are ejusdem generis with the payment of freight, conditions to be performed by the receiver of the goods. It seems to be unnecessary to refer to the other cases cited; suffice it to say, that none of them are inconsistent with *Russell* v. *Niemann.* (1) I will only add that *Russell* v. *Niemann* (1) was recognised and approved of in *Taylor* v. *Perrin*, an unreported case in the House of Lords, the shorthand writer's notes of which I have seen. Lord O'Hagan described *Russell* v. *Niemann* (1) as

(1) 17 C. B. (N.S.) 163.

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a perfectly well-decided case. Lord Blackburn said: "The case which has been referred to—*Russell* v. *Niemann* (1)—in which Willes, J., gave judgment, as it appears to me perfectly correctly decided that the reference to the charterparty is meant to bring in those conditions which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no means to be taken to incorporate all the conditions of the charterparty."

I am of opinion that the present case is governed by *Russell* v. *Niemann* (1), and that the judgment of the learned judge was right, and that this appeal should be dismissed.

KAY, L.J. We have to construe a bill of lading, dated December 20, 1887, which expresses that certain steam coals have been shipped on the *John Banfield*, then in the River Tyne, and bound for Trapani, which were to be delivered there in good order, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted, unto order or assigns, they paying freight for the said coals, and all other conditions as per charterparty." The question is, what is the effect of these last words? "They paying freight and all other conditions" primâ facie signifies, they paying freight and performing or observing all other conditions. "They" are the consignees, or their assigns, to whom this bill of lading is given. It is a contract between the shipowners and the consignees. The actual difficulty arises thus. The charterparty (amongst other conditions) contains one as to excepted risks, in much larger terms than the exception of risks in the bill of lading. It is a contract between the defendants and Fisher, Renwick & Co. that the ship shall load coal in the Tyne and proceed to Trapani, and deliver the coal there to the order of Fisher & Co., or their assigns, for a freight at a specified rate per ton, "the freighter paying all customary dues and duties on the cargo and the ship, all other charges (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and

(1) 17 C. B. (N.S.) 163.

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navigation, of what nature and kind soever, during the said voyage, always excepted)." The charterparty (amongst other things) provided that the liability of Fisher & Co. as to all matters and things in every respect, as well before and after as during the shipment, is to cease as soon as the cargo is shipped, and then follow these words, which create the difficulty, "Negligence clause as per Baltic Bill of Lading, 1885." The Baltic bill of lading contains this negligence clause: "Strandings and collisions, and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment, of the pilot, master, mariners, or other servants of the shipowners." But for this addition, the excepted risks in the charterparty and in the bill of lading which has to be construed would be in the same terms, save that the words, "during the voyage," are added in the charterparty. The additional exception of strandings and collisions occasioned by negligence is not among the risks expressly excepted in the bill of lading. Is this additional exception imported into the bill of lading by the words, "and all other conditions as per charterparty"? If the clauses as to excepted risks in the charterparty are to be written into the bill of lading, in addition to the clause on that subject already there, that would be to repeat the clause already in the bill of lading, and to add this further clause, "excepting certain risks occasioned by negligence." Can it, by any fair mode of construction, be said that the referential words, "all other conditions as per charterparty," oblige us to do this? Apart from authority, I should say, that, as the bill of lading has expressed what risks are to be excepted, which means that the goods shall be delivered to the consignee unless prevented by some of these excepted risks, this express contract could not be altered by such general words of reference, which cannot fairly be construed to incorporate into the bill of lading conditions in the charterparty relating to matters already expressly provided for in the bill of lading. Even grammatically this reading may be the only true one. It is "other conditions." Other than what? Other than freight certainly. But why not also, other than the matters expressly provided for in the bill of lading? Suppose it had expressly provided for freight at a

less amount than in the charterparty, would these words introduce the extra amount stipulated for in the charterparty? A contract must be read without bias in favour of either of the parties to it. But, where one of those parties has introduced a stipulation for his own benefit, it is an equally well-settled rule that, if the meaning be doubtful, the other party to the contract shall have the benefit of the doubt. The same rule is expressed in other words by saying, that, if the shipowner meant to add to the risks specifically enumerated in the bill of lading, he was bound to make this quite clear on the face of the contract: see per James, L.J., in *German* v. *Chapman*. (1) The plaintiffs are the owners of the cargo and the indorsees of the bill of lading. They sue the shipowner for damages, because the cargo was lost by stranding of the ship owing to negligence of the officers and crew, the damages claimed being the value of the cargo, less freight. If the view I have indicated be the true construction of the bill of lading, they must recover, because the negligence clause, though in the charterparty, is not imported into the bill of lading.

It was suggested at the Bar that the charterer and consignee were really the same person; but counsel did not insist upon this, and I do not think it could be maintained. But the argument has been, that the matter is settled against the consignee by authority which is binding upon us. The precise question arose in *Russell* v. *Niemann* (2), where the bill of lading excepted certain specified risks, and then contained the words, "paying freight for the said goods and all other conditions as per charterparty." The charterparty excepted the same risks, and others, and the question was, whether the further exception of other risks was introduced into the bill of lading. The Court, consisting of Willes, Byles, and Keating, JJ., held that it was not, the judgment of the Court upon this point, delivered by Willes, J., being that the words, "all other conditions, as per charterparty," were "limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods." It is urged that this decision has been overruled. No case expressly overruling

(1) 7 Ch. D. 276. (2) 17 C. B. (N.S.) 163.

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or dissenting from it has been cited; and in 1883 Lord Blackburn, in his speech in the House of Lords in an appeal in *Taylor* v. *Perrin* (1), gave to it the sanction of his high authority. However, that was not one of the actual grounds on which the case in the House of Lords was decided, and, therefore, is not binding as a judgment of the House of Lords, and we have accordingly to consider the cases which, though they do not profess to overrule *Russell* v. *Niemann* (2), are said to be inconsistent with it. In all of them it is treated as a question of construction of the particular bill of lading. The contest in many of them was, whether the consignee was liable for demurrage, the general rule being that he is not liable, to quote the words of Lord Campbell, (3) "unless the bill of lading makes the goods deliverable on payment of demurrage, or contains equivalent words."

In *Wegener* v. *Smith* (4) the words in the bill of lading were, that the goods were to be delivered "against payment of the agreed freight and other conditions as per charterparty." This was held to mean, some payment beyond freight stipulated for in the charterparty, which must be demurrage. In *Smith* v. *Sieveking* (5) Lord Campbell, C.J., delivered the judgment of the Court of Queen's Bench, entirely approving the last case, and holding that demurrage at the port of loading was not payable by the consignee, where the words in the bill of lading were, "paying for the goods as per charterparty," because by those words, "the reference to the charterparty must be considered merely to ascertain the rate of freight," and paying for the goods did not mean paying for the detention of the ship by the charterer.

These authorities, and all others that I have consulted, concur in shewing, that the immediate context of the words in the bill of lading to be construed is of great importance, and that, where the words are placed, as in this case, in a clause which begins, "the consignees paying freight and all other conditions," &c., the bill of lading must be read to refer to conditions to be

(1) Not reported.
(2) 17 C. B. (N.S.) 163.
(3) 4 E. & B., at p. 951.
(4) 15 C. B. 285.
(5) 4 E. & B. 945; affirmed in Ex., 5 E. & B. 589.

observed by the consignee. *Gray* v. *Carr* (1) was one of the cases most relied on by the appellants. There the words in the bill of lading were, "he or they paying freight and all other conditions, or demurrage (if any should be incurred) for the said goods as per the aforesaid charterparty." The words, "and all other conditions," were added in writing in a printed form. The shipowner claimed against the consignees named in the bill of lading a lien on the cargo (1.) for demurrage at the port of loading, (2.) for dead freight—i.e., freight for part of the ship which ought to have been filled with cargo but was not—and (3.) for damages for detention beyond the demurrage days. The majority of the judges in the Exchequer Chamber held, that a lien was given by the charterparty for demurrage proper, but not for detention beyond the demurrage days nor for dead freight, and that the right of lien for demurrage was imported by the bill of lading into the contract between the owner and consignee. The difficulty as to this was, that the charterparty did not provide for demurrage at the port of discharge, but only at the port of loading; and very weighty reasons were given by the present Master of the Rolls against construing the bill of lading so as to make the consignee liable for demurrage incurred before his goods were on board, and before the bill of lading was signed. It was pointed out that in *Wegener* v. *Smith* (2) the demurrage claimed had accrued in the port of delivery by default of the consignee. (3) But in *Gray* v. *Carr* (1) demurrage was actually mentioned in the bill of lading; the word is used, and the reference to the charterparty as to demurrage could not have any meaning except to secure to the owner as against the consignee the lien given by the charterparty for the only demurrage there contemplated, viz., demurrage at the port of loading. However, the principal matter which we have now to consider is, whether this case overruled or weakened the authority of *Russell* v. *Niemann*. (4) The decision is certainly not in the least inconsistent with it. *Russell* v. *Niemann* (4) was cited; but none of the judges intimated any disapproval of it, and it seems to me

(1) Law Rep. 6 Q. B. 522.
(2) 15 C. B. 285.
(3) Law Rep. 6 Q. B., at p. 539.
(4) 17 C. B. (N.S.) 163.

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that the two cases may very well stand together. The next case relied on is *Porteus* v. *Watney* (1), in the Court of Appeal. The words in the bill of lading were: "on paying freight for the said goods, and all other conditions as per charterparty." The charterparty provided for demurrage at the port of discharge. The ship seems to have been employed as a general ship, and the goods of the particular consignee were in the main hold, under the goods of other shippers who failed to take away their goods in proper time; so that, without any fault of the defendants, three days' demurrage was incurred before they obtained delivery. They were held liable. That is to say, the condition as to demurrage at the port of delivery was imported into the bill of lading by the words "all other conditions." This decision, again, seems to me quite consistent with *Russell* v. *Niemann.* (2) Demurrage at the port of delivery might reasonably, according to that case, be held to be one of the payments to be made by the consignee under the words "paying freight for the said goods and all other conditions as per charterparty," and, though it was a hard case on the particular consignee, that could not be a sufficient reason for saying that he had not so contracted. In *Gullischen* v. *Stewart Brothers* (3), under like words, an attempt was made to import into the bill of lading a clause in the charterparty making the responsibility of the charterers cease as soon as the cargo was on board, and thus leaving the shipowner no right of action against the consignee for demurrage at the port of discharge. This attempt was defeated by the judgments of Pollock, B., and Lopes, J., who both held that, in considering what clauses were to be imported into the bill of lading, the cesser clause must be rejected. Their decision was affirmed in the Court of Appeal (4), Lord Coleridge, C.J., saying, at p. 318: "Those words are incorporated which are consistent with the liabilities arising upon the bill of lading, and not those which are inconsistent." Lord Esher, M.R., said, at p. 319: "The clause as to cesser of the charterers' liability is not incorporated." Bowen, L.J., said, at p. 319: "The bill of lading

(1) 3 Q. B. D. 534.
(2) 17 C. B. (N.S.) 163.
(3) 11 Q. B. D. 186.
(4) 13 Q. B. D. 317.

incorporates certain provisions of the charterparty, but not the clause as to cesser of liability." In *Gardner* v. *Trechmann* (1) the words were, "other conditions as per charterparty"; and it was argued that those words made the consignee liable for an amount of freight stipulated for in the charterparty which exceeded the amount specified in the bill of lading. This was rejected, Lord Esher, M.R., saying that the general reference to the charterparty only brought into the bill of lading "those clauses of the charterparty which are applicable to the contract in the bill of lading; and those clauses of the charterparty cannot be brought in which would alter the express stipulations in the bill of lading." Cotton and Lindley, L.JJ., agreed.

The last words I have quoted appear to me to confirm the conclusion at which I have arrived in the present case. They are perfectly consistent with *Russell* v. *Niemann* (2), which is, as I think, supported by this decision of the Court of Appeal. *Hamilton* v. *Mackie* (3) seems to have decided that these words of reference would not introduce into the bill of lading a clause for reference to arbitration of any dispute upon the charterparty. I must say that, in my opinion, it is inexpedient to lay down a rigid rule of construction, such as that contended for by the appellants. We have been urged to hold, that the authorities which I have examined have determined that all the clauses of the charterparty, or at least all those that can be made to relate to a contract between the shipowner and the consignee, are to be read into a bill of lading containing these usual words of reference, and then those clauses which are inconsistent, which it is argued means contradictory to something in the bill of lading, are to be disregarded. If for "disregarded" you say "rejected," that is equivalent to not reading them in at all. I do not agree that this is the true result of the authorities. I hold the true result to be, that in each case the Court must decide from the context, and such surrounding circumstances as it is bound to regard, which clauses of the charterparty are to be incorporated into the bill of lading by such words as "all other conditions as per charterparty," and that where, as in *Russell* v. *Niemann* (2)

(1) 15 Q. B. D. 154. (2) 17 C. B. (N.S.) 163.
(3) 5 Times L. R. 677.

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and in the present case, certain risks are expressly excepted in the bill of lading, it is not a legitimate construction of the clause of reference to give it the effect of importing other and larger exceptions, because they are contained in the charter-party.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for defendants: *Stocken & Jupp.*

Solicitors for plaintiffs: *Coote & Ball, for Adamson & Co., North Shields.*

W. L. C.

Oct. 30.

EDWARDS *v.* ROBERTS.

*Justices—Practice—Jurisdiction of Court to hear Appeal against Exercise of Summary Jurisdiction—*20 & 21 *Vict. c.* 43, *s.* 2.

The Court has not jurisdiction to hear an appeal against a decision of justices by way of a case stated under 20 & 21 Vict. c. 43, s. 2, unless the appellant has given the respondent a notice in writing of the appeal together with a copy of the case, before transmitting the case to the Court.

CASE stated by justices under 20 & 21 Vict. c. 43, s. 2 (1), on the application of the appellant, a person convicted of offences under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and the Margarine Act, 1887 (50 & 51 Vict. c. 29), it appeared that the appellant's solicitor received the case on July 8, 1890, and set it down for hearing on July 9, and that

(1) By 20 & 21 Vict. c. 43, s. 2: "After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in, a summary way by any law in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law to be named by the party applying; and such party, hereinafter called 'the appellant,' shall within three days after receiving such case transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called the respondent."

on July 10 he sent a notice in writing of the appeal, and a copy of the case to the respondent's solicitor which the latter received on July 11.

E. H. Lloyd, for the respondent, submitted by way of preliminary objection that the Court had not jurisdiction to hear the appeal, inasmuch as the appellant had not given the respondent notice in writing of the appeal, with a copy of the case, before transmitting the case to the Court, pursuant to s. 2 of 20 & 21 Vict. c. 43. [He cited *Ashdown* v. *Curtis*. (1)]

F. Marshall, for the appellant. There has been a sufficient compliance with the Act. The order in which the requirements of s. 2 are observed is immaterial where, as here, both have been observed within the prescribed time. [He cited *Syred* v. *Carruthers*. (2)]

THE COURT (Day and Lawrance, J.J.), held that they had not jurisdiction to hear the appeal.

Appeal dismissed.

Solicitors for appellant: *Lloyd-George & George, Criccieth.*
Solicitors for respondent: *Williams & Millard, Dolgelly.*

(1) 31 L. J. (M.C.) 216. (2) E. B. & E. 469; 27 L. J. (M.C.) 273.

H. D. W.

C. A.
1890
Aug. 8;
Dec. 19.

[IN THE COURT OF APPEAL.]

WESTERN NATIONAL BANK OF THE CITY OF NEW YORK *v.* PEREZ, TRIANA & CO.

Practice—Service of Writ—Action against Foreign Firm—Service on Person temporarily within Jurisdiction "as Partner"—Order IX., r. 6.

A writ was issued against a partnership firm (sued by the firm name) which carried on business abroad and had no place of business in England, and all the partners in which were domiciled and resident abroad. The writ was served in England upon a person who was temporarily there, and whom the plaintiffs alleged to be a partner in the firm, he being served expressly "as partner." He entered a conditional appearance, which was, on the application of the plaintiffs, struck out as irregular, and he then entered an unconditional appearance, and, in his own name, moved to set aside the service, on the ground that he was not a partner in the defendant firm. A Divisional Court refused to set aside the service. On appeal:—

Held, by Lord Esher, M.R., that, under rule 6 of Order IX., the service on the appellant was good service on the firm:

Held, by Lindley and Bowen, L.JJ., on the authority of *Russell* v. *Cambefort* (23 Q. B. D. 526), that rule 6 of Order IX. did not apply to the case of a foreign firm, and that the service was not good service on the firm; but that the service on the defendant as an individual would have been good, if he had been named in the writ, and that he had by appearing waived the irregularity.

Ordered, therefore, that, if the plaintiffs would elect to amend the writ, by stating that the appellant was sued together with the other alleged members of the firm, who were to be named separately, the service should stand as against the appellant; but, if the plaintiffs would not so elect, the writ must be set aside, with costs.

By Bowen, L.J.:—*O'Neil* v. *Clason* (46 L. J. (Q.B.) 191) and *Pollexfen* v. *Sibson* (16 Q. B. D. 792) must be treated as overruled by *Russell* v. *Cambefort* (23 Q. B. D. 526).

Appeal by S. F. Koppel, a person who had been served with the writ in this action, against the refusal of a Divisional Court (Pollock, B., and Day, J.) to set aside the service of the writ upon him.

The following statement of the facts is taken from the written judgment of Lord Esher, M.R.:—

The plaintiffs, who were foreigners, issued a writ in the Queen's Bench Division of the High Court against the partners in a firm, suing them by their firm name, as acceptors in the firm name of bills of exchange, the bills and acceptances being general. The

firm so sued was a foreign firm, not carrying on business in England, and not having any place of business in England, and the partners were all resident and domiciled abroad. The writ was served in England on one Koppel, a foreigner, who was casually in England, and who was alleged by the plaintiffs to be a partner in the firm, and the writ was served upon him specifically "as partner." He at first entered an appearance, stating in it that he was not a partner. This appearance was, on the application of the plaintiffs, struck out, as being a conditional appearance, and, therefore, not a legal appearance, leave being by the order given to Koppel to enter an unconditional appearance. Thereupon he entered an unconditional appearance, and then in his own name moved in a Divisional Court to set aside the service of the writ upon him, on the ground that he was not a partner in the firm. There was no application in the name of the firm. The Divisional Court refused to set aside the service, and against this refusal Koppel appealed.

Aug. 8. *French*, *Q.C.*, and *Danckwerts*, for the appellant. Order IX., r. 6 (1) gives no jurisdiction against a foreign firm; under it a writ cannot be served upon a partner in such a firm who happens to be in England. Valid service could only be effected upon all the partners, if they all happened to be in England. And the plaintiff in such an action can proceed in another way. He can issue a writ against all the partners by name, serve it on any of them who are in England, and obtain leave to serve those who are out of the jurisdiction. In *Russell* v. *Cambefort* (2), the Court of Appeal held that the second clause of rule 6, which provides for service on the manager of a business, does not apply to a foreign partnership, the members of which are resident out of the jurisdiction, though it carries on business in this country. The principle of that decision applies equally to the

(1) Order IX., r. 6: "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm."

(2) 23 Q. B. D. 526.

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first clause of the rule. The service is an absolute nullity, not a mere irregularity, and has not, therefore, been waived under rule 2 of Order LXX. by the unconditional appearance which the appellant has entered: *Hewitson* v. *Fabre*. (1) It cannot be assumed that a man has waived that which he has all along been endeavouring to set aside. The appellant is interested in having the service set aside, for, even if he is not a partner (and by his affidavit he denies that he is), he is liable under rule 10 of Order XLII., to execution, if judgment is obtained against the firm, he having appeared in his own name. Under rule 15 of Order XII. a partner sued in the name of his firm must appear individually in his own name. Leave to issue execution would not be required: *Jackson* v. *Litchfield* (2); *Adam* v. *Townend*. (3) In *Ex parte Ide* (4) the bankrupt had not been served as a partner; he was only alleged to be a member of a firm against which a judgment had been recovered; and, therefore, execution could not be issued against him without the leave of the Court. The appellant denies that he is a partner, and in such a case the practice until recently was to enter a conditional appearance. But in *Davies* v. *André* (5) this Court held that that practice was wrong, and that the entry of a conditional appearance by a person who denies that he is a partner cannot be allowed. The practice of allowing a conditional appearance was founded on the old practice of the Court of Chancery, to which the attention of the Court was not sufficiently called in *Davies* v. *André*. (5) That practice has been frequently followed, and in effect it is recognised by rule 30 of Order XII., though it is thereby altered. In the absence of any express provision in the rules, if there was previously a variance between the Chancery and the Common Law practice, that which is the more convenient ought now to be followed: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (6); *Thomas* v. *Palin*. (7) In *Nelson* v. *Pastorino & Co.* (8), in an action in the Chancery Division against a partnership firm, and some individuals who were sued as, but were not in fact, partners,

(1) 21 Q. B. D. 6.
(2) 8 Q. B. D. 474.
(3) 14 Q. B. D. 108.
(4) 17 Q. B. D. 755.
(5) 24 Q. B. D. 598.
(6) 13 Ch. D. 310.
(7) 21 Ch. D. 360.
(8) 49 L. T. (N.S.) 564.

Pearson, J., recognised the validity of a conditional appearance.

Bigham, Q.C., and *Bray*, for the plaintiffs. The action is upon a bill of exchange against a firm, i.e., against a number of persons who choose to trade as a firm. The plaintiffs have a right to sue them by their collective name; but each of the defendants is bound to appear separately in his own name. The service of the writ upon a man who is a partner and who was in England at the time, was regular. The entry of a conditional appearance was directly contrary to the decision of this Court in *Davies* v. *André*. (1) Some difficulty may arise upon the construction of Order XLII.; but the defendant, after entering his appearance, took out a summons for security for costs. The question whether he is a partner or not is not decided by the entry of an appearance; it can be raised hereafter: *Pollexfen* v. *Sibson*. (2) The only question now is, whether the service of the writ can be set aside; the consequences of the service are immaterial for the present purpose. The case comes exactly within the words of Order IX., r. 6, and at any rate the appellant is, by his own conduct, precluded from raising the point now.

Cur. adv. vult.

Dec. 19. LORD ESHER, M.R., read a judgment, in which (after stating the facts as above), he continued. The question raised in the action, being one of liability on a contract, is a question of personal liability ambulatory with the person, and is, therefore, a question, although it arises abroad between foreigners, which the English Court must entertain, if the defendants are personally brought according to English law before the Court. The writ is, on the face of it, one which the English Court must entertain, if it has been duly served, The question, therefore, is, whether there has been such a service as, according to English law, brings the defendant in the action legally before the Court as a defendant; the defendant in the action being the firm, that is to say, all the partners in the firm. The question cannot be satisfactorily determined without a close examination of the English procedure as to service of English writs. That the

(1) 24 Q. B. D. 598. (2) 16 Q. B. D. 792.

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question is one of procedure is determined by this, that the writ is an English writ in respect of a matter over which the English Court has jurisdiction, if the writ is duly served. The service of the writ of the Court is, therefore, a part of the procedure of the Court. The procedure of the Court as to service of its writs is contained in the rules and orders passed under the Judicature Acts. In order to determine whether they can be applied to, and, if yes, their effect on, the particular case in question, it seems valuable to consider their bearing on other cases which are beyond question within them and governed by them. First, then, I will take the case of a writ issued against a defendant, an English subject found in England. The writ must be served, or that done which is equivalent to service (Order IX.). If the person attempted to be served desires to submit that there was no proper service, he must move to set aside the alleged service. But he must do so before he appears, because, if he appears, any irregularity in the service is waived by his appearance (Order XII., r. 30; Order LXX., r. 2). If the service is not impeached, the person served, the defendant, may appear or not. If he appears, he may defend by alleging he never was liable—that is, that he never ought to have been made a defendant. If that turns out to be so, the defendant succeeds. If the person served does not appear, the plaintiff files an affidavit of service of the writ on the defendant named in it, verifies the writ indorsed according to Order IX., r. 15, the affidavit of service alleging a service on A. B. as defendant, &c., according to Order XIII., r. 2. Upon such affidavit judgment is entered against the alleged defendant for default of appearance (Order XIII., r. 2). It is obvious from this statement that a judgment for default of appearance is procured solely on assertions of the plaintiff. He asserts a service on the defendant against whom he obtains such judgment. If there has been a service, however irregular, the defendant is bound by the judgment, unless the Court sets aside the service for particular reasons. It may be, however, that the affidavit of service, either by mistake or fraud, is erroneous, and that in truth the defendant was not served at all. Nevertheless, the judgment is good against the defendant named in it, until it is set aside. The defendant must move to set it aside (Order XXVII.,

r. 15). Of course, in the suggested case, it will be set aside with costs.

I will next consider a case equally beyond question governed by the rules and orders—the case of an action against the partners of an English firm in England, where the Court has general jurisdiction over the cause of action. The mode and manner in which the Court will exercise its jurisdiction is matter of procedure, regulated by the rules and orders. By them the partners may be sued in the name of their firm (Order XVI., r. 14). The partners, therefore, are sued, though the firm is, as it were, the defendant on the face of the writ. The service of the writ is regulated by Order IX., r. 6: "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having, at the time of service, the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm." The last word, "firm," in the rule, obviously includes all the partners in the firm. All the partners, therefore, shall be deemed to have been served. This is made, if possible, more clear by the rule as to appearance in such case: "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names" (Order XII., r. 15). This rule could not have been passed, except on the assumption that each and every partner is to be deemed to have been served. If a person is specifically served as a partner, and desires to allege that the service is wrong, he must before appearing move under Order XII., r. 30. But the only question then is, whether the service was regularly made in the prescribed manner. If it was, the person served must appear absolutely, or he will not appear. If he appears, he will defend, and his defence will be entertained. He can plead that he was not a partner, or that the firm was not liable. If he does not appear, the plaintiff will proceed to obtain judgment for default of appearance. As in the case of a single defendant, the plaintiff will verify the writ, and make an affidavit of service. The writ will disclose an action against the firm. The affidavit will assert service on the firm by means of service

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on A. B. as partner. Such service being deemed to be service on the firm, the judgment, following the writ, will be judgment against the firm for default of appearance. Execution will, without more, be against the property of the firm, and against the person who has, according to the affidavit of service, been actually served as a partner. But other persons alleged to be partners must be brought in according to Order XLII., r. 10. In the same way as in the case of an individual defendant, if the affidavit of service is, by mistake or fraud, erroneous to this extent, that in truth the person alleged to have been served as a partner of the firm has not been served in fact at all, the Court will, on the application of the firm, or of the person alleged to have been actually served, set aside the judgment and all proceedings. If the writ is against the firm, it may be served otherwise than on a partner. If there be a place of business within England, and a manager there, the writ may be served there on such manager. If the writ is so served, it is to be deemed to be service on the firm. There is no rule which says that the person so served, and served in that character, can appear in his own name. Order XII., r. 15, excludes him. He is not a partner, and, therefore, not a defendant. Partners, who have left their business to be managed by such a person, must accept the consequence of his omitting to inform them of the service of the writ on him. In case of such a service, and no appearance by a partner, the plaintiff could upon proper affidavits obtain judgment as for default of appearance and against the firm.

I will next consider the more delicate case of a writ issued against a foreigner not domiciled or resident in England, but found in England. In certain cases the English Court will entertain and determine a cause against a foreigner neither resident or domiciled in England. Whether the cause of action is one which the English Court can entertain as a cause of action will appear by the writ. If the writ is unobjectionable, the Court has the general jurisdiction over it. How is the Court to exercise such jurisdiction? It must proceed in it according to its own laws of procedure. The writ must be served, or that done which is equivalent to service. If the writ can be served in

England, it can, according to the rules and orders, be served without leave. If the foreigner is in England, the service can be on him without leave. Then it must be served according to the rules and orders, and with all the effects of such service as regulated by the rules and orders. The whole procedure, and all its results, will correspond exactly with all the steps and their results which have been described in the first case of a writ issued against an English subject and served on him in England. This is not denied. It follows from it, that the English procedure can be exercised against a foreigner temporarily in England, although neither resident nor domiciled in England. His case is governed by the procedure of the English Court.

If the foreigner thus sued is not found in England, or, indeed, if an English subject sued in England is not in England, the English laws of procedure could not be exercised outside the territorial jurisdiction of England by an English Court, unless the Court were authorized to do so by an English Act of Parliament which it was bound to obey. The writ must be one with regard to a cause of action which the English Court can entertain. Can the English Court serve such a writ abroad—first, on an English subject; secondly, on a foreigner? Order XI., r. 1, is a direct enactment that the Court can give leave to serve its writ abroad. The cases in which it can are exhaustively included in Order XI. But in those cases it can. It is only by virtue of that rule being equivalent to an enactment that the Court could give such leave. Whether such enactment is strictly within international comity is a question which no English Court can entertain. The order binds the Court. The order is conclusive that, to the extent to which it goes, the Court must exercise its jurisdiction over a foreigner neither resident nor domiciled in England. The Forms 5 and 6 in Appendix A to the Rules of the Supreme Court, 1883, and the note to Form 5, support, if necessary, the view, that by English Act of Parliament, a foreigner sued by a writ issued from an English Court, is, in certain cases enumerated in Order XI., liable to be proceeded against in enforcement of that writ by the English enacted rules and orders, it being true, however, that only enacted rules and orders could be used against him. But, if the Order XI. is effective

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against him, it seems absurd to say that the enacted rules made for the purpose of giving effect to the service of a writ served under that order do not bind him. Otherwise, the leave given under Order XI. would be futile. If, therefore, the leave is given under Order XI., and the service is effected, then all the effects enacted by the other rules and orders must have the same force against the defendants so served as against a defendant served in England. The Plaintiff may, on proper affidavits, obtain judgment for default, with all its consequences. In case of mistake or fraud, and in all respects, the Court would deal with such judgment precisely in the same manner as with any other judgment signed for default of appearance.

We now come to the case of foreign partners of a foreign firm sued in an English Court, the partners being all abroad, and none of them resident or domiciled in England. If the partners were each and all sued by name, it is difficult, I think impossible, to say otherwise than that each of them would be subject to the procedure and rules and orders just previously described. Each of them would be within Order XI., and, therefore, within the consequent or consequential rules. If their case is within some of the rules, they must, I think, be within all the rules. There is no distinction made between the rules. They are all rules made for the same ultimate purpose, viz., for the purpose of enforcing the writ of the Court. They are all rules of procedure adapted to different circumstances, but with one ultimate purpose. If so, the rules as to the form of the writ, and as to its service, must have the same effect in the case of foreign partners as in the case of a foreign individual. Then the foreign partners, in the case in which an English writ can issue, may in such writ be sued by their firm name. The Court may, under Order XI., give leave that the writ may be served abroad. If the writ may be served abroad, the reasoning which led to the conclusion that all the rules subsequent to the service must apply to an individual, who might by leave be served abroad, will lead to the same conclusion with regard to a firm which by such leave may be served abroad. It follows, that service on one partner abroad is service on the firm and on all the partners of the firm. If one partner is served, and he

appears, his appearance is that of the firm. If he does not appear, judgment for default of appearance will be entered against the firm. In case of mistake or fraud, or of other like circumstances, the same relief or indulgence will be given as in all other cases of judgment for default of appearance. And, if one of the foreign partners be found in England, service may be effected on him without leave. Order XI. is not then called into play. But the other orders and rules apply, and service on that partner is service on the firm and on all the other partners, with all the consequent results. As to this last case, *Pollexfen* v. *Sibson* (1) is absolutely in point. The reasoning of the judges in that case seems to me to be the same as the reasoning more elaborately set forth in this judgment. *Davies & Co.* v. *André & Co.* (2) is, I think, an authority that service in England on a foreign partner found in England is a good service on the foreign firm. The question directly decided was, that a conditional appearance was no appearance at all. That the service was good was not disputed. *Russell* v. *Cambefort* (3) is hardly consistent with all the reasoning of this judgment. But in it *Pollexfen* v. *Sibson* (1) was not overruled. *Russell* v. *Cambefort* (3) raises for the present, in my opinion, an exception as to the application of the second part of Order IX., r. 6, to the service of a sufficient writ in the prescribed manner on a foreign firm, where all the partners in it are foreigners abroad. I have gone elaborately into all the cases to which the rules and orders are applicable in order to shew how I construe those rules. If my view is right, the present case is simple. The service on the person alleged by the plaintiffs to be a partner could not at any time have been set aside. It certainly cannot be set aside now that he has appeared unconditionally. He can proceed to make his defence. What that defence may be, what questions may arise with regard to it, I think it unnecessary now to suggest. Again, it has been said, that no foreign Court would enforce in its own country a judgment obtained in this country, procured under the rules and orders in the manner above described. That may be so as to the partners not actually served, and as to their shares in the

(1) 16 Q. B. D. 792. (2) 24 Q. B. D. 598.
(3) 23 Q. B. D. 526.

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partnership property. It hardly seems that it would be so as to the property or share of the partner who has actually been served. All these questions do not, as it seems to me, arise yet in the present case. But, supposing that the judgment would be ineffectual abroad, it may well stand as a valid judgment in this country, effectual against any partnership or personal property which may hereafter come into this country. I have the strongest opinion that the rules and orders as to the service of writs abroad should be at once revised. The appeal, in my opinion, should be dismissed.

LINDLEY, L.J. I have had the advantage of reading the judgment which is about to be read by Bowen, L.J., and in which I concur. I will only, therefore, add a few words on my own account. When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names. Now, if one of those partners is out of the jurisdiction, the mode of proceeding against him is under Order XI., and the necessity for proceeding against him under Order XI. exists, whether he is sued by name or as one of the firm under Order IX. That is the ratio decidendi of the Court of Appeal in *Russell* v. *Cambefort* (1), and is, in my judgment, right. That case is inconsistent with some other decisions which will be alluded to presently by Bowen, L.J. Practically, it comes to this, as I understand it, that, if a member of a firm is resident abroad, the prudent way is to proceed against all the partners by name, or against all who are in this country, and not to attempt to proceed under Order IX. and sue them in the name of the firm, which will lead to trouble in getting judgment and future execution, and had better be avoided. The order appealed from should be varied as the Lord Justice will state.

BOWEN, L.J., read the following judgment. The contracts here sued upon are foreign contracts, made and to be performed abroad;

(1) 23 Q. B. D. 526.

the contracting parties on both sides are wholly resident and domiciled abroad, having no place of business, and, so far as appears, no joint assets, in this country. But a person, who is alleged to be one of the partners of the firm, being temporarily and accidentally in England, has been served with a writ, issued against the firm in the firm's name, and served upon himself "as partner." This person, to whom I hereafter allude as the defendant, has appeared; but he objects to the writ, and asks us to set it aside altogether, as null and void and not warranted by the rules.

The first question which arises is, whether such service is good service against the "firm" within the meaning of Order IX., r. 6. The second question will be, whether, assuming the writ as against the firm to be misexpressed, it is not (after the defendant's appearance) to be held good as against himself, the case of the plaintiffs being that the defendant is a partner in the firm, without proof of which fact they cannot succeed. If the writ in its present form, and the service of it, are to be held valid as against the firm, the judgment entered, if the plaintiffs were to prove successful in the action, would be in form a judgment against the firm (Order XII., r. 15)—a judgment which in such a shape would not be recognized by any other country, since the firm are not within English jurisdiction. It is contrary to the doctrines of international law that a judgment should have any validity, except against such persons as are, or as have been brought, within the jurisdiction of the Court that gives it, and, as the other members of the foreign firm do not come within this category, a judgment against the entire foreign firm's property would be useless abroad, and unjust both abroad and here. Upon such a ground it has been urged before us that it was never intended by Order IX., r. 6, to deal with actions against foreign firms, the members of which are wholly resident abroad, but that the procedure which governs such actions is indicated by Order XI., so far as concerns service of writs out of the jurisdiction. In opposition to this view, the plaintiffs' counsel have contended before us, that Order IX., r. 6, applies to actions against all firms, foreign and English alike, whether or not the members of such firms are or are not resident abroad; that

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the rules are not necessarily intended to be confined within doctrines of international law, and are competent to prescribe how actions should be tried against all persons, outside or inside the jurisdiction; and, lastly, that Order IX., r. 6, had in effect prescribed what procedure should be adopted both as respects foreign firms and English.

I do not think that the field is open to me to discuss this broad and important subject upon principle apart from authority. *Russell* v. *Cambefort* (1) was a case which arose under the same rule and order, although the service in that case was effected, not on a partner, but on a manager of the partnership business. The judgment of the Court of Appeal was, however, based expressly on the view, that Order IX., r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England, and I do not think we should be carrying out the real view of the law so laid down if we were to seek to distinguish the case of service effected on a partner under one portion of the rule from that of service effected on a manager under the other portion of it. We are, therefore, I think, bound to apply the same reasoning to both cases, and, this being so, we ought to hold, on the authority of *Russell* v. *Cambefort* (1), that the present writ is incorrectly issued against the firm, and cannot be justified as against the firm by Order IX., r. 6. It follows that *O'Neil* v. *Clason* (2) and *Pollexfen* v. *Sibson* (3) must be treated as overruled by *Russell* v. *Cambefort* (1) and *Shepherd* v. *Hirsch, Pritchard, & Co.* (4), if really inconsistent with that decision, must not be followed. It must not be supposed that our decision implies, that no remedy can be had against foreign firms, or such of their members as happen to come within the jurisdiction. The law as to suing and serving them will remain what it always has hitherto been, though the writ cannot, under Order IX., r. 6, be addressed against them in the foreign firm's name. The old course will be still pursued, viz., to insert in the writ the names of the partners whom it is desired to sue, and such writ so framed may be served on any of the partners who are found within the juris-

(1) 23 Q. B. D. 526.
(2) 46 L. J. (Q.B.) 191.
(3) 16 Q. B. D. 792.
(4) 45 Ch. D. 231.

diction. For service out of the jurisdiction, recourse must be had to Order XI., if the case is one which can be brought within the rules of that order.

The law as to actions against foreign firms being thus, according to the effect of our present decision, wholly unaltered and unaffected by Order IX., r. 6, it becomes necessary to apply ourselves to the second question in this case, viz., whether, as against the defendant who has appeared, the writ should be set aside, on the ground of its being directed against his firm. And it appears to me that, as against the defendant, the service of the writ must under the circumstances be upheld. The defendant is not the less intended to be sued, because he is intended to be sued with others, who with him are misnamed, and who together with him are intended to be comprehended (though as we have seen irregularly) in one firm name. The writ is no doubt irregular, in that it uses a single firm name to describe the defendant and others, who are beyond the jurisdiction. This irregularity as regards the firm must be set right. What has been writ short must be writ large, for the plaintiff is not entitled to the benefit of Order IX., r. 6, nor to the advantage of proceeding further as against the firm in the firm name. But the defendant is really himself sued together with others, since the plaintiff intends to include him, and to shew at the trial that he is properly included among the members of the firm, and the irregularity of the nomenclature in the writ the defendant has waived as against himself by appearance, since he might if he had chosen have moved, under Order XII., r. 30, to set aside the service upon himself, and was not obliged to appear to enable him to move. The service, therefore, must stand as against himself, if the plaintiffs elect to amend the writ in ten days, so as to state that the defendant is sued together with the other alleged members of the firm, who should be named separately, and, when this amendment has been made, the parties will be left to take such further steps, if any, in respect of the progress of the action which they may be advised, if any steps can be lawfully taken against the remaining defendants beyond the jurisdiction, as to which I offer no opinion at present. The defendant will be entitled in his defence, if the action proceeds, to avail himself of

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any defence open at law or equity to a defendant who is sued, together with other persons beyond the jurisdiction, on an alleged liability which he disputes.

The costs here and below will in such a case be costs in the cause.

If the plaintiffs do not so elect in ten days, the writ must be set aside, and the plaintiffs must pay all the costs, down to and including the costs of the appeal.

In conclusion, in addition to what has been said by the Master of the Rolls, I desire to express an opinion, formed by some experience and observation, of the necessity of redrafting the rules under the Judicature Act, so far as they affect partnership.

Order varied.

Solicitors: *Travers Smith, Braithwaite, & Robinson; J. W. Sykes.*

W. L. C.

C. A.

Nov. 6, 7, 17; *Dec.* 6.

[IN THE COURT OF APPEAL.]

ROGERS, SONS & CO. *v.* LAMBERT & CO.

Bailor and Bailee—Estoppel—Jus tertii.

The bailee of goods cannot avail himself of the title of a third person to the goods as a defence to an action of detinue by the bailor except by further shewing that he is defending the action on behalf and by the authority of such third person.

Biddle v. *Bond* (6 B. & S. 225) approved.

TRIAL of action before Day, J., without a jury.

The plaintiffs' claim was for damages for the non-delivery of 200 tons of copper purchased by the plaintiffs from the defendants, or, in the alternative, damages for the wrongful conversion of the copper.

The plaintiffs were copper-merchants in London; the defendants were copper-smelters, carrying on business in London and at Swansea. The plaintiffs had bought the copper from the defendants, and had paid for it; but the defendants had retained it in their possession as warehousemen, subject to payment of warehousing charges, and had given the plaintiffs delivery orders, which directed delivery to the order of the plaintiffs,

and the defendants had entered the plaintiffs' name in their warehouse-books as the owners of the copper.

It was admitted that the plaintiffs before the action had sold the copper to a firm named Morrison, Kekewich & Co., who had paid them the price of it, and that they had indorsed the delivery orders to Morrison, Kekewich & Co.

The delivery orders had never been presented to the defendants.

Before the commencement of the action, the plaintiffs gave notice to the defendants that they cancelled the indorsement of the delivery orders, and requested the defendants not to deliver the copper to any one but themselves.

The defendants did not profess to be defending the action upon the right or by the authority of Morrison, Kekewich & Co.; on the contrary, they admitted, in answer to interrogatories delivered by the plaintiffs, that they were defending it in their own interest.

Under an order of the Court, the copper was sold, and the proceeds of sale were paid into Court.

It appeared that Morrison, Kekewich & Co. had re-sold the copper, and that a French bank claimed to be interested in it.

Cohen, Q.C., and *Mansel Jones*, for the plaintiffs.
Reid, Q.C., and *J. V. Austin*, for the defendants.
Pollard, for the French bank.
Boyd, for Morrison, Kekewich & Co.

The learned judge held that the plaintiffs, under the circumstances, had ceased to have any interest in the copper, and had no cause of action against the defendants, for whom he gave judgment.

An order was made that the money in Court should be paid out to the defendants, and it was paid out accordingly.

The plaintiffs appealed.

1890. Nov. 6, 7. *Cohen, Q.C.*, and *Mansel Jones*, for the plaintiffs. The defendants had become bailees of the copper from the plaintiffs. A bailee cannot set up the jus tertii against his bailor, except by the authority of the third party: *Biddle* v.

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Bond. (1) If the sub-vendees of the plaintiffs had before the action claimed the copper from the defendants, the defendants might have a right as against the plaintiffs to withhold it on that ground; but they cannot withhold the copper on their own account for the purpose of gaining some advantage for themselves. They have not attorned to any one else, and their possession is in law the possession of the plaintiffs, their bailors. By their answers to interrogatories, they admit that they withheld the copper, and that they are defending the action, on their own account and not by the authority or under the direction of the owners. There is no case in which a bailee has been allowed to say as against his bailor that he did not defend for any other person, but claimed to hold the goods for his own benefit: *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (2) If a bailee re-delivers the goods bailed to his bailor without notice of the title of a third party it is not a conversion.

A bailor can, even if he has given delivery orders, revoke the authority given to the warehouseman before the latter has attorned to the third party: *Sheridan* v. *New Quay Co.* (3)

[LOPES, L.J., referred to *McEwan* v. *Smith.* (4)]

A warehouseman can with perfect safety deliver up goods to his bailor, if he has not attorned to any one else. If the defendants had bonâ fide, on the demand of the plaintiffs, delivered up the copper to them before any demand by Morrison, Kekewich & Co., they would have had a complete defence to any action by the latter, even if they had had notice that the copper had been sold to them. In fact, they had no notice of any sale to Morrison, Kekewich & Co. till after the commencement of this action. They had only notice that the delivery orders had been indorsed to some one, who might have been an agent for the plaintiffs. A bailee of goods may deliver them to the true owner, or, if the title of the true owner has accrued after the bailment, he can interplead, or he can on behalf of the true owner defend an action by the bailor. The defendants have not adopted any of these courses, but have defended the action on

(1) 6 B. & S. 225.
(2) 30 L. J. (C.P.) 247.
(3) 4 C. B. (N.S.) 618.
(4) 2 H. L. C. 309.

their own behalf, and they have no defence to the plaintiffs' demand: *Ex parte Davies.* (1)

[LORD ESHER, M.R. Even if the plaintiffs are entitled to judgment, what damage has the defendants' breach of contract caused to the plaintiffs, if they have been paid for the copper? The plaintiffs may never be sued by any one. Is there any authority for giving damages quia timet?]

As against the bailee, the bailor has the better right to the possession of the goods. The plaintiffs are entitled to possession to enable them to fulfil their contract with Morrison, Kekewich & Co.

[LORD ESHER, M.R. Must not the Court have regard to the equities, and decline to make any order as to the copper until all the parties interested are before it?]

The proceeds of sale have been paid out of Court.

Reid, Q.C., R. S. Wright, and *Loehnis,* for the defendants. It is admitted that the plaintiffs have absolutely parted with the property in the copper; they have sold it to Morrison, Kekewich & Co., and have been paid for it. If Morrison, Kekewich & Co. were to sue the plaintiffs for non-delivery of the copper, the plaintiffs' answer would be, "You yourselves prevented our delivering to you by the notice which you gave to the defendants." The damages would not exceed a shilling. And, as to detinue, the damages could only be the amount of the plaintiffs' real loss. The plaintiffs have no property in the copper, and the defendants are liable to an action by the true owners.

By the contract of bailment the bailee acknowledges the then existing title of the bailor; the contract is to deliver the goods to the bailor, if he has not in the meantime parted with his title. In *Biddle* v. *Bond* (2) the bailor had no title at the time of the bailment; such a case is entirely different from one in which the bailor loses his title after the bailment. The present case is like *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (3) It is a good defence by a bailee to a demand by the bailor for the goods, to shew that, since the delivery of the goods to him, the bailor has sold them to a third person:

(1) 19 Ch. D. 86. (2) 6 B. & S. 225.
(3) 30 L. J. (C.P.) 247.

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Neave v. *Moss.* (1) This argument is quite consistent with *Biddle* v. *Bond.* (2) The defendants were entitled to have the delivery orders produced, or to have their absence accounted for, they having received notice that the plaintiffs had parted with the copper. Is a bailee bound as an honest man to hand over to his bailor goods which he knows that the bailor has sold to some one else? Even in the absence of notice, if the bailee has reasonable ground of suspicion that the bailor is not the true owner of the goods, why should he be mulcted in damages, if it turns out that his suspicion was well founded? The bailee's acknowledgment of his bailor's title is only an acknowledgment of the title at the time of the bailment.

As to damages, there is no question of conversion of the copper, and the damages can only be nominal.

Cohen, Q.C., in reply.

A bailee is no doubt entitled to a reasonable time for inquiring who the true owner of the goods is; but that is not the defence here. In *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (3) the judgment of the Court was founded on *Sheridan* v. *New Quay Co.* (4), and no distinction is taken between a case in which the title of the third party accrued before the bailment and a case in which it accrued after the bailment.

[LOPES, L.J., referred to *Thorne* v. *Tilbury.* (5)]

As to damages, the order to pay out the money to the defendants was made before any decision upon the claim of Morrison, Kekewich & Co.

Boyd, for Morrison, Kekewich & Co.

Pollard, for the French bank.

Cur. adv. vult.

1890. Nov. 17. LORD ESHER, M.R. The plaintiffs bought copper from the defendants and paid the defendants for it; so that undoubtedly the copper belonged to the plaintiffs. Then they agreed with the defendants that they should hold the copper for them upon an ordinary warehouseing agreement, the terms of which were, that the defendants should charge warehouse rent and

(1) 1 Bing. 360.
(2) 6 B. & S. 225.
(3) 30 L. J. (C.P.) 247.
(4) 4 C. B. (N.S.) 618.
(5) 3 H. & N. 534.

other ordinary charges, and should deliver the copper to the plaintiffs, or to their order, on demand. Now, what is that relation in law? The defendants are bailees under a contract with the plaintiffs. The plaintiffs after that indorsed the delivery orders to a third party, to whom they had sold the copper, and they were paid for it. So that, as between themselves and the third party, whoever he may be, the plaintiffs have no longer any interest in the copper. They have been paid for it, and yet, for some reason which we do not know, the plaintiffs, who really have no interest in the copper, gave notice to the defendants, who were their bailees, to deliver the copper to them, and they offered the defendants an indemnity against the outstanding delivery orders. The defendants refused to give up the copper to the plaintiffs. They did not say, "You have sold the copper to a third person, and you have given him delivery orders, and he has claimed the copper from us, and, therefore, we are not safe in delivering it to you, and we must either deliver it to him, or we must ask for an interpleader order." Indeed, they could not obtain an interpleader order, because no one had presented the delivery orders to them. They did not say "We know that you have indorsed the delivery orders, and handed them over to such a firm, and upon their behalf we decline to give up the copper to you, and we shall defend any action which you may bring against us, not in our own interest, because we have none, but for them." On the contrary, the defendants, in their answer to the plaintiffs' interrogatories, said expressly, "We are holding the copper for ourselves." They refused to give up the copper, and they are not defending the action on behalf of any third party, but on their own account. The question, therefore, is, What are the rights as between the plaintiffs and the defendants? If the fact is, as it is alleged, though not yet proved, that the defendants had found out who are the persons in possession of the delivery orders with a right to use them, the defendants would have succeeded if they had defended the action on behalf of those persons. But they have not done so; and if, therefore, they are held liable, it is because they have not chosen to defend themselves in the way which the law recognises. If they had defended in that way, what would have been their position?

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They must have found out the person for whom they were to defend, and they would have run the risk of finding out the right person; because, if a bailee defends in that way, he must defend on behalf of a third party whom he names. It is not enough for him to allege the right of a third person; he must allege it and prove it. Therefore, the defendants would have been bound to find out which of the many claimants of this copper was really entitled to it, and then to defend on that person's behalf and to prove his title. For some reason which we do not know the defendants have not chosen to do this. What is the law? The defendants held the copper for the plaintiffs, upon a contract to deliver it up to them or to their order. Even though the plaintiffs had given a delivery order to a third person, still, as between the plaintiffs and the defendants, the plaintiffs could withdraw that order at any moment, and they did withdraw it by demanding the goods. Therefore, upon the contract of bailment, the defendants are without any defence as for a breach of contract. What the result of that is I will consider presently.

But the plaintiffs are also suing in detinue for the wrongful detention of the copper. The rights between the plaintiffs and the defendants cannot be altered by the mere form of the action. If it be true that the defendants were detaining the plaintiffs' copper by means of a breach of contract, then the plaintiffs will be entitled to recover in detinue.

Now, looking at the matter upon the contract, let us see what the nature of the contract is. The action is for damages for the breach of it. There are many mercantile contracts for the breach of which the damages are fixed by law, for reasons which the law has recognised. If an action is brought for breach of contract by the non-acceptance of marketable goods, or the non-delivery of marketable goods, the law has determined that the damages are, the difference between the contract price and the market price. But for the breach of a contract to deliver goods which are not marketable there is no fixed rule, and it can only be said that the law will give the plaintiff the damage which he has suffered. What damage would the plaintiffs suffer by the breach of this contract? In my opinion, they would suffer only nominal damages. They have really no in-

terest in the copper. Why they insisted upon the delivery of the copper to them I know not; but they are entitled, at all events, in respect of the breach of contract, to nominal damages. But, upon the count in detinue, if the copper had been still in the defendants' possession, I cannot doubt that the plaintiffs would have been entitled to have it handed over to them. The copper, however, has been sold; but the money which represents it has been ordered by the Court to be paid, or it has been agreed by the parties that it shall be paid (it signifies not which), to the defendants. Then, upon the strict right, on the count in detinue, it seems to me that, unless the defendants have a defence which they can set up as against the plaintiffs, the plaintiffs are entitled to the money which represents the copper, as damages.

In my opinion, the law is laid down in *Biddle* v. *Bond* (1) by Lord Blackburn, in a considered judgment of the Court of Queen's Bench, delivered by a judge who knew more about these matters than anyone else, and it is, I think, laid down there distinctly that, as between a bailee and his bailor under an ordinary contract of bailment, the bailee must, if he desires to defend an action for the non-delivery of the goods upon the demand of the bailor, shew that he has already delivered them upon a delivery order authorized by the bailor, or he may ask for an interpleader order, or he may, at his own risk as regards the plaintiff, say, "I defend the action on behalf of A. B., and I say that he is the person really entitled to the goods." If he takes the latter course, he must not only allege the title of the third party, but he must prove it; and, if he does not prove it, he has no defence. "A bailee," says Lord Blackburn, "can set up the title of another only if he defends upon the right and title and by the authority of that person." He must allege that title and must prove it. That is the law laid down, and it seems to me rightly laid down, in *Biddle* v. *Bond*. (1) Therefore, I am of opinion that the defendants cannot defend the action on the right and title and by the authority of a third person, because they have not named any such person, or shewn that they have any such authority, or that any person has such a right. Indeed, the defendants have said in deliberate

(1) 6 B. & S. 225.

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terms that they are not defending the action for any one else, but are defending for themselves only. As between the plaintiffs and themselves, the defendants have no defence. Therefore, if we were to stand upon the strict rights as between the plaintiffs and the defendants, it seems to me that the plaintiffs were entitled to succeed in the action. So far as the breach of contract is concerned, I think they were entitled to judgment for nominal damages; so far as the detinue is concerned, I think they were entitled to delivery of the copper, and they would have had it, but that it has been sold. But, as I understand, the plaintiffs, in order to avoid further litigation, agreed that the proceeds of sale should be paid into Court, so that the Court might upon a proper application, if any application be made, determine who is really entitled to the money. If no other claim is made, the plaintiffs will have the right to the money as against the defendants. If other claims are made, the Court must determine who is entitled.

I think, therefore, that judgment should be entered for the plaintiffs, they agreeing that the money shall be paid into Court, to be subject to the order of the Court, or, inasmuch as the defendants are perfectly solvent, if they will undertake to hold the money to the order of the Court, it will not be necessary to pay it into Court. Then, the money being held to the order of the Court, any person who claims it can bring his claim before this Court, giving notice to all the other persons who claim to be entitled, and then this Court will determine the dispute as between all the parties, without more expense than is absolutely necessary.

With regard to the costs, the plaintiffs were entitled to succeed, and I think they ought to have the costs of the action, and also the costs of the appeal. They could not do otherwise than appeal from the judgment, and they have substantially succeeded in their appeal. The plaintiffs must have the costs both of the action and of the appeal.

The following judgment was read by

LINDLEY, L.J. I agree. I wish, however, to add, that the defendants have only themselves to thank for the trouble into

which they have got. As soon as there were several rival claimants to the copper, the defendants should have instituted interpleader proceedings against the rival claimants. It is true that, according to the principles laid down by Lord Cottenham in *Crawshay* v. *Thornton* (1), such proceedings would have been improper by reason of the bailment. But that case was decided before the Common Law Procedure Act, 1860, had been passed; and although other decisions in Chancery may be found since that Act, founded upon and following *Crawshay* v. *Thornton* (1), it has been pointed out that the provision in the Common Law Procedure Act, 1860, has materially modified the principles on which that case was decided, and has enabled the Court to grant relief to a person who has entered into a contract with one of the interpleading parties. This was settled by *Attenborough* v. *London and St. Katherine's Dock Co.* (2) That case and the more recent decision in *Robinson* v. *Jenkins* (3) (both in the Court of Appeal), shew, that, notwithstanding the contract of bailment, the defendants could have instituted interpleader proceedings in this case. If they had taken this course, the true owner of the copper would have been ascertained, and the copper, or the money representing it, would have been adjudicated to him.

For reasons, however, best known to themselves, the defendants did not take this course, nor did they defend the action on behalf of the true owner. They have defended the action in their own right, and the defence which they have set up is insufficient.

The following judgment was read by

LOPES, L.J. The copper in question was left with the defendants under such circumstances as to establish between the plaintiffs and the defendants the relationship of bailor and bailee.

The facts have been fully stated. The law, as I understand it, is this. It is an implied term of the bailment of goods that the bailor at the time of the bailment had a good title to the goods bailed. The general rule is, as was said by Blackburn, J., in *Biddle* v. *Bond* (4), "that one who has received property from

(1) 2 My. & Cr. 1.
(2) 3 C. P. D. 450.
(3) 24 Q. B. D. 275.
(4) 6 B. & S. 225, at p. 231.

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another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it." A bailee may, however, equally with a tenant, shew that the title of his bailor to the goods has expired since the bailment: *Thorne* v. *Tilbury*. (1) So, too, a bailee may set up a jus tertii, if the facts shew that there has been what is equivalent to an eviction by title paramount: *Shelbury* v. *Scotsford*. (2) But, suppose the bailee retains possession of the goods, and there has been no eviction, the bailee may, nevertheless, set up and rely upon the jus tertii, if he defends his possession upon the right and title and by the authority of the tertius. *Biddle* v. *Bond* (3) is an authority for this. In that case, Blackburn, J., delivering the judgment of the Court of Queen's Bench, said (at p. 233): "We think that the true ground on which a bailee may set up the jus tertii is that indicated in *Shelbury* v. *Scotsford* (2), viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley* v. *Read* (4), that 'to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim, or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever.' Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C.B., in *Thorne* v. *Tilbury* (5), that a bailee can set up the title of another only 'if he defends upon the right and title and by the authority of' that person. Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences."

Here the defendants are defending for themselves, and claiming to hold the copper for their own benefit, and the action is, therefore, undefended.

Appeal allowed.

(1) 3 H. & N. 534.
(2) Yelv. 22.
(3) 6 B. & S. 225.
(4) 4 Q. B. 511, 517.
(5) 3 H. & N. 534, 537.

Dec. 6. By consent the following order was made on the appeal:—

Appeal allowed, and judgment and order of Day, J., of July 5, 1890, reversed, and judgment entered for plaintiffs for the costs.

Declare that, as between the plaintiffs and the defendants, the plaintiffs were entitled to the copper in question.

Order defendants to pay to plaintiffs, or their solicitors, the costs of the appeal, and their costs (if any) of the application to Day, J., on July 5, 1890.

And, the plaintiffs not objecting, order that the defendants do, within twenty-four days, repay into Court to the credit of the action the sum of 8859*l.* 16*s.* 3*d.*, paid out to them under the above-mentioned order of Day, J.

And further, that any person claiming the copper in question, or the above-mentioned sum representing the same, be at liberty to apply to this Court for payment of it, as if he were a party to this action, upon giving notice to the parties to this action and to all other claimants, and that the question of all subsequent costs be reserved.

And further (the defendants consenting, without prejudice to their right to appeal against the reversal of the judgment of Day, J., and the foregoing declaration consequent thereon), that the defendants do serve notice of this order upon Morrison, Kekewich & Co., and on all persons known to the defendants to claim an interest in the copper, or the money representing the same.

Solicitors: *Druces & Attlee*; *Johnson, Budd, & Johnson.*

W. L. C.

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Poor-rate—Certified Industrial School—County Council—Liability to be rated—Industrial Schools Acts, 1866 & 1872 (29 & 30 *Vict. c.* 118; 35 & 36 *Vict. c.* 21)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41).

The county council are rateable to the poor-rate in respect of the occupation of an industrial school established by justices under the Industrial Schools Acts, 1866 & 1872 (29 & 30 Vict. c. 118; 35 & 36 Vict. c. 21), and vested in the county council under the Local Government Act, 1888 (51 & 52 Vict. c. 41).

SPECIAL CASE stated on appeal to the Quarter Sessions for Durham against the poor-rate of the parish or township of Witton Gilbert.

The parish or township of Witton Gilbert is situated wholly within the administrative county of Durham. The assessment appealed against was made on the county council in respect of land, a school, and hinds' house. (1)

(1) By the Prison Act, 1865 (28 & 29 Vict. c. 126, s. 5), as respects any prison belonging to any county having a separate Court of Quarter Sessions, the justices in quarter sessions assembled shall be prison authorities for the purposes of that Act. And by s. 8 there shall be provided at the expense of every county having a separate prison jurisdiction adequate accommodation for its prisoners in a prison or prisons constructed and regulated in such manner as to comply with the requisitions of this Act in respect of prisons, and all expenses incurred by a prison authority in carrying into effect the provisions of the Act, shall be defrayed out of the county rate. By the Prison Act, 1877 (40 & 41 Vict. c. 21, s. 4), all expenses incurred in respect of the maintenance of prisons to which this Act applies shall be defrayed out of moneys provided by Parliament. By s. 5, subject as in this Act mentioned, all powers and jurisdiction at common law, or by Act of Parliament, or by charter vested in or exercisable by prison authorities or the justices in sessions assembled, in relation to prisons or prisoners within their jurisdiction, shall be transferred to, vested in, and exercised by one of Her Majesty's principal Secretaries of State. By s. 16, the obligation of any county to maintain a prison or to provide prison accommodation for its prisoners shall cease. By s. 61 the expression "prison authorities" in that Act shall have the same meaning as in the Prison Act, 1865, and ss. 48 and 56 vest every prison and the site, land, furniture, and effects belonging thereto in the Prison Commissioners.

By the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 4), in

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In the year 1881 the Quarter Sessions for Durham, professing to act as the prison authority for the county, resolved to establish a county industrial school under the Industrial Schools Acts, and submitted to the Home Secretary the plans of a farm, partly freehold and partly copyhold, at Earl's House, near the city of Durham (being the farm mentioned in the assessment), which they proposed to purchase for the purpose. The Home Secretary signified his approval of the intended purchase, and by an indenture and surrender, both dated July 6, 1883, the farm was conveyed to the clerk of the peace of Durham and his

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this Act the term "prison authority," with respect to England, has the same meaning as in the "Prisons Act, 1865. By s. 5 the persons for the time being having the management or control of an industrial school shall be deemed the managers thereof for the purposes of this Act. Sects. 6 and 7 provide for the inspection of industrial schools by Her Majesty's Inspectors of Prisons, and empower the Secretary of State, if satisfied with the inspector's report, to certify that a school is fit for the reception of children to be sent there under the Act. Sect. 12 authorizes prison authorities to contribute (inter alia) towards the support of the inmates of a certified industrial school, or towards the management of such a school, or towards the establishment or building or the purchase of land for the site of a school intended to be a certified industrial school, provided (amongst other things) that the approval of the Secretary of State be previously given for such establishment, building, or purchase. Sect. 13 prescribes the manner in which the approval of the Secretary of State is to be procured. Sect. 44 empowers the Secretary of State to withdraw his certificate in certain events, and provides that in such case the school shall cease to be a certified industrial school. Sect. 45 provides for the resignation of certificates by managers, and s. 50 that expenses incurred by prison authorities in carrying this Act into effect shall be deemed expenses incurred by that authority in carrying into effect the provisions of the Prison Act, 1865, and shall be defrayed accordingly; and s. 53 for the service of any notice on managers by being (inter alia) sent in a letter addressed to them, or any of them, at the school. The Reformatory and Industrial Schools Acts Amendment Act, 1872 (35 & 36 Vict. c. 21), s. 7, authorizes prison authorities themselves to undertake anything towards which s. 12 of the Act of 1866 authorizes them to contribute.

The Prison Authorities Act, 1874 (37 & 38 Vict. c. 47), after reciting that prison authorities under the Industrial Schools Acts, 1866 & 1872, had no power to borrow money for the purposes of such schools, authorizes prison authorities to borrow money for defraying the expense of (inter alia) establishing, building, or purchasing the site of any industrial school under the said Acts, or any of them. [In addition to the above-cited sections the Acts above mentioned were referred to generally, and in particular ss. 10, 11, 29, and 32–34 of the Act of 1866.]

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successors in office upon trust for the purposes of the Industrial Schools Acts, 1866 & 1872. The indenture recited the purchase of the farm by quarter sessions as the prison authority, and the approval of the Home Secretary, as before stated.

The purchase-money of the farm and the cost of the buildings and furniture were paid out of moneys borrowed by the county justices under the Prisons Authorities Act, 1874, on security of the county rate.

On June 29, 1885, the Home Secretary certified that the new school was fit for the reception of children under s. 7 of the Industrial Schools Act, 1866; the school was opened on July 2, 1885, and had since subsisted as a certified industrial school within the meaning of the Acts above mentioned. In addition to the officers' apartments, the school comprised accommodation for 150 boys, including a cottage hospital and workshops, in which they were taught trades such as shoemaking and carpentering, by schoolmasters, who formed part of the regular staff. There was also a hinds' house, in which a farm bailiff resided, under whose directions the boys were employed in tilling the farm. The farm and the buildings above mentioned were of a reasonable size, having regard to the purposes for which they were required, and afforded no accommodation further than such as was essential for the proper employment and education of the boys. The revenue of the school consisted, first, of the grants in aid paid by the Government under the Industrial Schools Acts; secondly, of payments made in respect of boys committed to the school, but not at the cost of the county; and, thirdly, of the proceeds of the boys' work and of the sale of the surplus produce of the farm, the bulk of which produce, however, was consumed in the school. These sums together had not been in any year sufficient to defray the expenses of the school, and a considerable sum had been raised annually out of the county rates to meet the deficiency.

Until April 1, 1889, the school was under the management of quarter sessions; but on that day the Local Government Act, 1888 (51 & 52 Vict. c. 41), came into operation, by s. 3 of which all business done by quarter sessions or any of its committees in respect of the establishment and maintenance of

and the contribution to industrial schools was transferred to the county council. Since the last-mentioned day it had been assumed as between the quarter sessions and the county council that the effect of the Act was to transfer the management also of the school to the county council, and the school had, in fact, been managed by the county council; but there had been no fresh appointment of superintendent, although some changes had been made among the minor officers. The usual deficiency was made up last year (as before) out of the county rates.

The valuation list of the union was duly made and approved by the assessment committee, and the county council gave notice of objection against the same, but failed to obtain relief. The rate now appealed against was made in conformity with such valuation list.

The questions for the opinion of the Court were, first: (1.) Were the above-mentioned premises liable to be rated to the poor-rate? (2.) Was the county council in the actual occupation of the said premises? (3.) Was the county council in such occupation of the said premises as to render the said council liable to be rated? (4.) If yes, was the rateable value properly entered in the said rate?

1890. Nov. 3. *Lawson Walton, Q.C.* (*Simey*, with him), for the appellants. The industrial school is not rateable at all. It was established by justices as prison authorities, under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), in which the term "prison authority" has, by s. 4, the same meaning as in the Prisons Act, 1865. The school is for children sent to it under a magistrate's order (s. 14), detained there, and subjected to discipline as offenders. The institution has the same object, and is in the same category as a prison. It is a house of correction. By the Prisons Act, 1877, the control of prisons was transferred to the Secretary of State; but the management of industrial schools was left to the justices. A gaol is not rateable: *Gambier* v. *Overseers of Lydford* (1), because it is used for the government of the country: see *Mersey Docks* v. *Cameron*. (2) In *Coomber* v. *Justices of Berks* (3) the

(1) 23 L. J. (M.C.) 69. (2) 11 H. L. C. 443.
(3) 9 App. Cas. 61.

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exemption of Assize Courts from income tax, which depends on similar principles, was based on three grounds: first, that they were used for the administration of justice; secondly, that they were incapable of beneficial occupation, as they could not be let; thirdly, that there was no occupation as tenants because the justices could not occupy them. In *West Bromwich School Board* v. *Overseers of West Bromwich* (1) the property might have been let. But the justices have no power to let the industrial school. "There is no beneficial occupation, if by law no benefit can possibly arise to the occupier"—per Brett, L.J., in *Hare* v. *Overseers of Putney*. (2) Buildings used for public purposes connected with the government of the country are not rateable: *Nicholson* v. *Assessment Committee of Holborn Union*. (3) The industrial school in *Reg.* v. *West Derby* (4), and reformatory school in *Tunnicliffe* v. *Overseers of Birkdale* (5), which were held to be rateable, were established by private enterprise or charity, although the boys were sent there by order of justices, and the committee of management might let or sell the premises. The justices could not occupy the school. They are not a corporation, and, although the county council is incorporated, a mere transfer of rights from the justices to them would not increase the liability.

R. S. Wright (*R. Cunningham Glen*, with him), for the respondents. The school is capable of beneficial occupation. It is in no sense "struck with sterility." The county council are not bound to carry it on always as an industrial school, and the Act provides for their ceasing to do so. The two last decisions on the subject do not proceed upon the ground of any power to underlet the premises, but on the broad ground that beneficial occupation appears from the actual occupation of the body rated. *Reg.* v. *School Board for London* (6); *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union*: *The Same* v. *Churchwardens, &c., of Egginton and Assessment Committee of Burton-upon-Trent Union*. (7) In the *Mersey Docks*

(1) 13 Q. B. D. 929.
(2) 7 Q. B. D. 223, at p. 233.
(3) 18 Q. B. D. 161.
(4) Law Rep. 10 Q. B. 283.
(5) 19 Q. B. D. 280; 20 Q. B. D. 450.
(6) 17 Q. B. D. 738.
(7) 24 Q. B. D. 197.

Cases (1) the statute prevented the use of the premises for any other purposes than those for which they were acquired; whereas these premises might be used for other purposes than those of a school. Justices are rateable: *Justices of Lancashire* v. *Overseers of Cheetham* (2), and could be rated. The names of all those in the commission might be put into the rate. Judges' lodgings would be rateable as being capable of beneficial occupation, but for the fact that they are used for the Crown. The amount of profit is immaterial. Secondly, there is a broad distinction between reformatory schools, which are really prisons established under 29 & 30 Vict. c. 117, and industrial schools, under 29 & 30 Vict. c. 118, which may be established in many ways, and the general principle is that they shall be established by private individuals, subventions being given by the county. Boys sent to a reformatory have been convicted, whereas boys merely found begging, wandering, or destitute, or who are beyond parental control, may be sent to an industrial school. Such a school is not part of the prison system, but of the educational system. The boys may be placed out in houses to learn trades. All real property is now rateable except that occupied for the Crown, and the exception is not to be extended: *Martin* v. *Assessment Committee of West Derby* (3), per Brett, L.J.

Lawson Walton, Q.C., in reply.

DAY, J. The question raised upon this special case is whether a certain industrial school, which is now vested in the county council of Durham, is or is not rateable. The history of the school is shortly this. It was established by justices: it was certified in the ordinary way by the Home Secretary, and the school was carried on as an industrial school under the direction of the justices until the Local Government Act, 1888, was passed, whereupon this building and the control of it were transferred, with other buildings which had previously been vested in the justices or in their officer, and were under the control of the justices, to the county council. A rate has been made upon the county council in respect of this

(1) 11 H. L. C. 443. (2) Law Rep. 3 Q. B. 14.
(3) 11 Q. B. D. 145, at p. 152.

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building, and the question which we have to determine is whether that rate is or is not enforceable. Primâ facie all property of which a beneficial ownership may exist is rateable to the relief of the poor. There are certain exceptions. The Crown, of course, is not liable for any burthens unless it is specially named in an Act of Parliament: the Crown is not specially named in the Act of Parliament instituting rates; therefore the Crown cannot be rated in respect of any property whatever which it occupies; and buildings which are occupied for public purposes by its principal officers have been held not to be rateable. There is another class of exemptions, which has been affirmed to exist with respect to buildings occupied *quasi* by the Crown for the purposes of the Crown, and for public purposes and by public officials. Under such head are classed Assize Courts, where justice is administered in the name of the Crown, county courts, prisons, and other buildings which are undoubtedly exempt from rateability. One point made on behalf of the appellants is, that this industrial school comes, at all events, under that class. It cannot be seriously contended that an industrial school comes under the head of prisons. It is not a prison. Persons sent there have to stay there; but that fact does not make it a prison. There are many places in which persons have to remain which are not to be deemed prisons. But the school is said to exist merely for the benefit of the public. That is no ground of exemption. A vast amount of property in this country is used solely for the benefit of the public; but it does not cease to be rateable on that account. It is said that the school was founded by the magistrates, that public money was used for the purpose of founding it, and that it was for a considerable time controlled by the magistrates. That in my judgment does not affect the question of rateability. To my mind it does not matter whether the money with which it was built was public money or private money. It might have been done partly with one and partly with the other. All industrial schools, I think, rely on public money to some extent for their maintenance. The fact of public money having been invested in these institutions, and that they exist in the public interest, does not relieve them from rateability. It has been decided beyond question that an industrial

school supported by private subscriptions is rateable. There is nothing in the nature or object of an industrial school which involves any distinction between the case of one founded with public money and controlled by justices or a public authority, and the case of one founded mainly by private persons and controlled by private persons under the supervision of the Secretary of State. It cannot be contended that this school comes under any exemption which has been ascertained by legal decision. Although in decisions with reference to the exemption from rateability of private schools, the fact that those schools are private institutions, and controlled by private persons has been noticed, it does not follow from those judgments that therefore, if the schools had been founded and controlled by public bodies, the cases would have been decided differently.

It is not necessary to decide whether if the property were still in the hands of the justices it would be rateable or not. I give no opinion on that. The school is now in the hands of the county council, and there is no authority whatever for saying that the county council are the servants of the Crown; nor, in my judgment, for saying that the justices were the servants of the Crown. Of course the justices represent the Crown, and for some purposes may be deemed to be servants of the Crown, but certainly not *quâ* managers of an industrial school. They did not manage it as servants of the Crown, nor by virtue of their office as justices of the peace, but because, under the statute, persons who were justices of the peace were thought peculiarly fitted for the purpose, and were appointed managers. I certainly see no ground for holding this industrial school exempt from rateability while under the management of the county council.

The other point argued was that, to use an expression which is found in several of the cases, it had been struck with sterility. The idea of a building struck with sterility is somewhat difficult to conceive. I cannot understand how this can be said to be struck with sterility. If the county council give it up, the property may be sold. I do not know why the county council should not, if the state of the county justified it, give up the use of an industrial school. Supposing another generation should bring us to the conclusion that industrial schools are

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DAY, J.

injurious to the interests of society, I presume they would be given up by the county council. Then what are they to do with the school? It is said they may sell it, it may be that they might use it, I do not know; but it has a rateable value, it is land covered with buildings which I can readily assume that a hypothetical tenant would take, and I know of no Act of Parliament which says that a county council shall not make the best of it if it be deemed necessary at any time to give it up, or if the Home Secretary were to withdraw his licence. The existence of the industrial school depends on the Home Secretary's licence or certificate. Whenever that is withdrawn it becomes unlawful for the county council to use the building as an industrial school, and they have then to do the best they can with it as public property, to be utilized for the public interest. I do not see any reason in point of law why a hypothetical tenant should not be invented for the purpose of paying a value for the occupation of this industrial school.

I think that the property has been properly rated, and that our decision ought to be in favour of the respondents.

LAWRANCE, J. I am entirely of the same opinion. I think that the case is like the case of the reformatory school; indeed, it seemed to be admitted that, except for the fact that the justices were the persons who instituted this school, it would have been in the same position as the reformatory school, which undoubtedly was rateable. I do not think that the school comes under any of the exemptions which have been referred to. It is not the property of the Crown, and is not occupied by the Crown; and I think that, whatever the justices may have been at the time the school was instituted, the appellants certainly are not now in any sense the servants of the Crown. If we had to decide whether the magistrates themselves were rateable at the time they were in the occupation of the building, I should have no hesitation in coming to the conclusion that they were, on the ground that, in my judgment, the object to be attained by the school, and not the persons by whom it is to be carried out, must be considered—that is to say, the mere accident of its being carried out by the justices instead of by private persons is

not material. As to the argument that the managers were unable to let the school at any moment they liked, it seems that they could even have sold it. Speaking for myself, I cannot see much distinction between being able to let it and being able to sell it.

Judgment for respondents.

Solicitors for appellants: *Indermaur & Brown.*
Solicitors for respondents: *H. C. Coote & Ball.*

J. R.

[IN THE COURT OF APPEAL.]

C. A.
1891
Jan. 12.

SHOWERS AND OTHERS, APPELLANTS: THE ASSESSMENT COMMITTEE OF THE CHELMSFORD UNION, RESPONDENTS.

Poor Rate—Beneficial Occupation—Residence of Police Officer—Rateability—Exemption of Property occupied for Public Purposes.

The appellants, being respectively the chief constable, the deputy chief constable, and two other officers of the constabulary force of the county of Essex, occupied as residences part of a building vested, under the Local Government Act, 1888, in a joint committee of the justices of the county and the county council. The whole building was under one roof, and consisted of the chief constable's and deputy chief constable's houses, quarters for the other two officers and their families, clerks' offices, store-rooms for police clothing, a parade-room, stables, coach-house, and other outbuildings. The whole of the premises and grounds were inclosed by a wall, and were used solely by the police force for the purposes of, and were the head-quarters of, the county constabulary, the chief constable being bound to reside there as a condition of his appointment. Nothing more was provided for the accommodation of each officer than was necessary having regard to his rank in life; and each paid a rack rent for the premises occupied by him, such rent being deducted from his pay:—

Held, affirming the judgment of the Queen's Bench Division, that the rule exempting from rateability property occupied for the purposes of the government of the country did not apply to the premises occupied by the appellants as residences, and that each of them was rateable to the relief of the poor in respect of his occupation.

CASE stated for the opinion of the Queen's Bench Division.

The following material facts were stated in the case:—

The appellants are, the chief constable of the county of Essex, the deputy chief constable, a superintendent of police, and a sergeant of police, all of whom reside in buildings called

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SHOWERS v. ASSESSMENT COMMITTEE OF CHELMSFORD UNION.

"Springfield Court," in the parish of Springfield, in the county of Essex.

The respondents are the Assessment Committee of the Chelmsford Union, within which union the said parish of Springfield is situated.

On October 18, 1889, a poor-rate for the said union was made by the overseers of the poor of the parish of Springfield.

A copy of the rate was inserted in the case. Under the heading "Name of occupier" appeared the names of Showers and the other three appellants. The "owner" was described as "the county of Essex." The "Description of property rated" was, in the case of Showers, "house and garden," and in the case of the other three appellants, "house"; the "Name or situation of the property" was "Springfield Court"; and then followed statements (which it is unnecessary for the purposes of this report to set forth) of the amounts of the gross estimated rental, rateable value, and rate in respect of each appellant.

The appellants objected to the rate on the ground that the premises were not rateable, as they were part of a county police-station, and occupied solely for the purposes of the Crown. The appellants, thereupon, appealed against the rates to the assessment committee, who confirmed the assessment.

The constabulary force for the county of Essex was appointed under the Act 2 & 3 Vict. c. 93, and the county was divided into police districts, and station-houses and strong rooms were provided under the Act 3 & 4 Vict. c. 88.

The parish of Springfield is situated within one of these police districts, and the property called Springfield Court is about a mile from the county town and borough of Chelmsford, being in fact the head-quarters of the Essex constabulary. There are not now any police cells used for the reception and detention of prisoners at Springfield Court; but the county police make use of a portion of the ground floor of the Shire hall in Chelmsford, which is county property, as a police office. This, however, is not provided with sleeping accommodation, being nothing more than a space partitioned off and supplied with desks and office-fittings. The cells for the detention of prisoners whilst in the custody of the police are also in the Shire hall.

The office and cells are used both by day and night. There are no other premises in the Chelmsford Union used for police purposes than those before mentioned.

The whole of the premises called "Springfield Court" belonged formerly to the justices of the peace for the county of Essex, but are now, under the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), vested in a joint committee consisting of an equal number of county justices and county councillors. The whole of the premises are used exclusively for the purposes of the police, and consist of the chief constable's house, containing dining-room, drawing-room, morning-room, library, bedrooms, kitchen, with stables, coach-house and the usual offices, and a garden; the deputy chief constable's house, containing dining-room, drawing-room, bedrooms, kitchen, and the usual offices, and a garden; of a superintendent's quarters, containing sitting-room, living-room, bedrooms, and kitchen; of a sergeant's quarters, containing sitting-room, kitchen, bedroom, and scullery; and also of clerk's offices, store-rooms for police clothing, &c., parade-room, stables, coach-house, and other outbuildings. The chief constable, the deputy chief constable, and the two other officers, and the wives and children of those who are married, live and sleep at Springfield Court.

The premises occupy three sides of a square, and open into one centre court, and have gardens adjoining. The whole building is under one roof, the front doors from all the separate quarters opening into the court. The whole of the premises and grounds are enclosed by a large brick wall, so that they can only be entered by the main gate, or through the back way to the stable yard.

All the premises are used solely by the police force for the purposes of the county constabulary, the chief constable being bound to reside there as a condition of his appointment. Nothing more is provided than is necessary for the proper accommodation of the several officers, taking their respective ranks in life into consideration. Only the portions of the premises in which the chief constable and the other three officers before mentioned reside are rated.

Each officer pays a rack rent for the premises occupied by

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him, such rent being deducted from his pay, and the deduction applied in aid of the police rate. The rent in each case includes rates, taxes, gas, and repairs. If the premises or any part thereof are liable to be rated, the rate will have to be paid out of the police rate.

Prior to April 1, 1889, the police in the county of Essex were annually inspected by a government officer, who reported as to the state and efficiency of the force. If the report was satisfactory, a grant was made by the Treasury in aid of the police rate. By the Local Government Act, 1888, all matters connected with the police have been transferred from the county justices to a joint committee composed of an equal number of justices and county councillors. A government inspector still continues to inspect and report upon the police force to the Secretary of State.

The question for the opinion of the Court was whether, under the circumstances, the appellants, or any of them, were liable to be rated towards the relief of the poor in respect of their or his occupation on the premises.

1890. Nov. 4. *Channell, Q.C.*, (*R. Woollett*, with him), for the appellants. Upon the facts stated in the case the buildings in question are not rateable. They come within the rule that property owned and occupied for public purposes is exempt from rateability. There are two classes of cases with respect to the rating of buildings occupied by the police. In the first class police-stations, as such, have been held not rateable: *Justices of Lancashire* v. *Overseers of Stretford* (1); *Coomber* v. *Justices of Berks* (2); *Reg.* v. *St. Martin's, Leicester.* (3) In the second class it has been held that, where a house or rooms have been hired for a police-constable by the county authorities, there being no room for him in the police station, there was a rateable occupation by the constable: *Martin* v. *Assessment Committee of West Derby* (4); *McHarg* v. *Assessment Committee of Stoke-on-Trent.* (5)

(1) E. B. & E. 225; 27 L. J. (M.C.) 209.

(2) 9 Q. B. D. 17; 10 Q. B. D. 267; 9 App. Cas. 61.

(3) Law Rep. 2 Q. B. 493.

(4) 11 Q. B. D. 145.

(5) 48 J. P. 775.

The line drawn is an arbitrary one, and it is submitted that the buildings in question come within the first class of cases. The statements in the case shew that Springfield Court is the head-quarters of the Essex County Constabulary, not a house outside a police-station and hired merely for the residence of constables. The fact that rent is paid for parts of the buildings makes no difference. It is only a mode of remunerating the constables. The Court will not look whether particular rooms or parts of the buildings are occupied profitably if the building as a whole is occupied by the police for public purposes: *Martin* v. *Assessment Committee of West Derby.* (1) In *Gambier* v. *Overseers of Lydford* (2), the Court of Queen's Bench (Coleridge, J., dissenting), held that the official residence, within the prison walls, of the governor of a prison was exempt from rateability, but the residences of the officers of the prison outside the walls were not. If that is the test, the whole of the buildings in question here are enclosed by a wall. They are occupied by the joint committee for the purposes of the public government of the country, and therefore for the service of the Crown. The fact that they are now vested by the Local Government Act, 1888, in a joint committee of the justices and the county council can make no difference in respect of their rateability.

W. H. Grubbe, and *W. B. Duffield*, for the respondents, were not heard.

DAY, J. The question in this case is whether or not the appellants are exempted from rateability in respect of certain buildings said to be used for public purposes. Now it must not be supposed that I dissent from any of the principles laid down in the various cases to which our attention has been called. I do not for a moment question that living accommodation provided for a person who is required to be there as part of the service of the crown does not impose upon that person a liability to be rated. I agree also with what Lord Coleridge, C.J., said in *Martin* v. *Assessment Committee of West Derby.* (1) No doubt where public buildings, such as a prison or station-house, are

(1) 11 Q. B. D. 145. Judgment of Lord Coleridge, C.J., at p. 150.

(2) 3 E. & B. 346; 23 L. J. (M.C.) 69.

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occupied together, not by any individual personally, but by some public body representing the Crown, and occupying them for the purposes of the public government of the country, the fact that there is some beneficial occupation of a portion of the buildings forming an integral portion of the whole which is in itself not rateable, does not make the persons who derive a benefit from the occupation of that portion rateable. But here we are dealing with property which to a large extent consists of buildings, the rateability of which is in dispute. It consists of buildings occupied as residences by officers of the police. We are not dealing with a building, such as a prison, which one may almost say ex vi termini is exempt from rateability, but with a place which is in the main used for residences. No doubt there are portions of Springfield Court—such, for instance, as the parade-room and the place where the clothes are kept—which may not be rateable; but these portions form but a small part of the whole buildings. The question really is whether these buildings occupied by officers of the police as residences for which they pay rent, though the buildings are connected by an outside wall with other buildings used for public purposes, are exempt from rateability. I cannot bring myself to say that they are exempt. If the buildings used as residences for the police officers were outside the wall which enclosed the buildings used for public purposes, they would, according to the decisions, be rateable. In my opinion they are rateable inside the wall. Springfield Court may be said to be a place where the police are stationed, because they live there, stable their horses there, and have their clothes there; but I think that this case comes within the rule that police officers beneficially occupying houses as residences, in a place where they are stationed for the purposes of their duty, are rateable in respect of their occupation.

LAWRANCE, J. I am of the same opinion. I think that this case is governed by *Gambier* v. *Lydford*. (1) I also think that the fact that the control of the buildings is now vested in a joint committee of the justices and county council, instead of in the justices only, makes no difference with respect to the

(1) 3 E. & B. 346; 23 L. J. (M.C.) 69.

question of rateability. Our judgment must be for the respondents.

Judgment for the respondents.

W. A.

1891. Jan. 12. The appellants appealed from this judgment.

Channell, Q.C., and *R. Woollett*, in support of the appeal, in addition to the cases cited above, referred to *Jones* v. *Mersey Docks* (1), *Reg.* v. *Stewart* (2), and *Reg.* v. *Fuller*. (3)

W. H. Grubbe and *W. B. Duffield* were not called on.

PER CURIAM (Lord Esher, M.R., Bowen and Fry, L.JJ.). The question is one of fact. The case shews that Springfield Court is not a single building in the occupation of the county, and used for the purposes of a police-station, but is divided into tenements. The tenements in respect of which the appellants were rated are occupied beneficially by them for their own domestic purposes, and do not come within any exemption from rateability.

Appeal dismissed.

Solicitors for appellants: *Paterson, Snow, Bloxam, & Kinder; for H. & H. W. Gibson, Ongar.*

Solicitors for the respondents: *Duffield & Bruty.*

(1) 11 H. L. C. 443. (2) 8 E. & B. 360.

(3) 8 E. & B. 365, n.

A. M.

C. A.
1891
Jan. 26.

[IN THE COURT OF APPEAL.]

MONK *v.* BARTRAM.

Practice—New Trial—Stay of Execution—Application to Court—Special Circumstances to support Application.

Where a stay of execution has been refused by the judge at the trial, an application made to the Court of Appeal for a stay pending an appeal must be supported by special circumstances, and allegations that there has been misdirection, that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the Court will grant the application.

APPLICATION by the defendant for a stay of execution.

The case was tried before Grantham, J., with a jury, and the verdict and judgment passed for the plaintiff. A stay of execution was applied for but refused.

Kemp, Q.C., (*Horace Browne*, with him), applied for a stay of execution until the hearing of a motion in the Court of Appeal for a new trial, the ground of the motion being misdirection.

Scarlett, for the plaintiff, was not called on.

LORD ESHER, M.R. Since the Court has had to deal with motions for new trials, instead of their going to a Divisional Court, we have been most anxious not to change the practice which prevailed in the Divisional Court, and not to alter the rights of the parties. We have made inquiries, and find that the practice in the Divisional Court has been similar to that as to appeals in this Court in cases of trials before a judge without a jury. It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shewn to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution. No special circumstances are brought forward in this case, the only ground for the application being,

that a motion is to be made for a new trial on the ground of misdirection. The application must, therefore, be refused.

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BOWEN and FRY, L.JJ., concurred.

Application refused.

Solicitor for plaintiff: *C. F. Martelli, for R. Preston, Tonbridge.*
Solicitor for defendant: *F. Cherry.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.

Jan. 26.

CUSACK AND ANOTHER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Practice—County Court—Appeal—Extension of Time for Entering the Appeal—Order LIX., *r.* 16.

On an application to extend the time for entering an appeal from a judgment of a county court, the Divisional Court refused the application on the ground that they were bound by the view expressed by the majority of the Court of Appeal in *Collins* v. *Vestry of Paddington* (5 Q. B. D. 368) as to the distinction between applications for an extension of time previous to the trial of the action and applications to extend the time for appealing after judgment, and the more stringent practice applicable to the latter cases. On appeal:—

Held, that no such distinction or practice ought to be recognised as governing the exercise of the discretion vested in the Court.

APPEAL by the plaintiffs from an order of a Divisional Court, refusing an application for an extension of time for entering an appeal from the judgment of the county court.

The case was tried on December 12, 1890, and resulted in a judgment for the defendants. On December 18 application was made to the judge for a copy of his notes, and an application was also made to the defendants for a copy of a document produced by them at the trial; but neither was obtained. Notice of appeal was given on December 29. Order LIX., r. 12, requires that such an appeal shall be entered in twenty-one days from the date of the judgment; but application to enter the appeal was not made till January 3, 1891, when the officer declined to enter the appeal on the ground that the application was a day too late. A motion was made in the Divisional Court before Pollock, B., and Charles, J., for an extension of time under Order LIX., r. 16, on

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the ground of mistake as to the time when the appeal could be entered, the slip being stated in an affidavit to have been accidental, and due to the delay in waiting for the document and the judge's notes. The Divisional Court decided that they were bound by the view expressed by the majority of the Court of Appeal in *Collins* v. *Vestry of Paddington* (1), that there was a distinction in the practice as to granting extension of time according to whether the application is made before or after judgment, and that a more stringent practice prevailed in the latter case; and on this ground the application was refused.

The plaintiffs appealed.

Cavanagh, in support of the appeal. The Court, by the express words of Order LIX., r. 16, has a discretion which it is asked to exercise in this case.

Shearman, contrà. There is a difference in the mode in which the Court will deal with an application to extend the time for doing any act before judgment and an application to extend the time for appealing: *Collins* v. *Vestry of Paddington* (1) and *Reg.* v. *Kettle*. (2) These cases shew that a mistake arising from negligence or ignorance is no ground for extending the time for appealing.

LORD ESHER, M.R. I think this application should be granted on the terms I have already stated during the argument. I think we ought to express our opinion that the judgment of Wills, J., in *Reg.* v. *Kettle* (2), was not intended to be a decision that the Court has no discretion as to granting an extension of time after judgment. The case of *Collins* v. *Vestry of Paddington* (1) looks as if, at the time it was decided, some at least of the judges of the Court of Appeal thought that either there was no discretion in such a case, or that, if there was a discretion, it ought never to be exercised. That view, as has been pointed out during the argument, has been, in its strictness, departed from by almost every judge who has sat in the Court of Appeal, and it cannot now be supported. I think we must say that there is a discretion in such a case as the present, which the Court cannot exercise loosely,

(1) 5 Q. B. D. 368. (2) 17 Q. B. D. 761.

but which should be exercised on a consideration of the circumstances of each case as it arises.

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BOWEN, L.J. I agree. There have been a number of cases since *Collins* v. *Vestry of Paddington* (1), in which the Court of Appeal has discussed that case. The conclusion arrived at has been that no rule fettering discretion should be laid down, and that the Court is not bound to act on any such rule. The case belonged to a period in which stricter views on this point were held; but since that time eminent judges, who were inclined at one time to lay down a severe rule upon the lines of which the discretion should be exercised, one and all came round to the now generally received opinion, that in such a matter no hard and fast line can be laid down, but that each case must be considered solely on its merits.

FRY, L.J. I am of the same opinion, and I think that in this case there are special circumstances which justify the application, and require us to grant the indulgence asked.

Appeal allowed.

Solicitor for plaintiffs: *Thomas Bore.*

Solicitor for defendants: *C. H. Mason.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1890 Dec. 11.

IN RE LANGLOIS & BIDEN, SOLICITORS.

County Court—Costs—Higher and Lower Scale—"Sum Recovered"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 118—*The County Court Rules*, 1889, *Appendix.*

When the sum claimed in an action in a county court exceeds 10*l.* and the sum recovered is less than 10*l.*, though the costs as between party and party must, under the County Courts Act, 1888, s. 118, and the County Court Rules, 1889, be taxed on the lower scale prescribed by the rules, the taxing officer has a discretion to allow a larger amount of costs as between solicitor and client, but not exceeding the amount fixed by the higher scale prescribed by the rules.

APPEAL from a decision of Huddleston, B., at chambers.

Messrs. Langlois & Biden acted as solicitors for the plaintiff in an action in the Southwark County Court, in which he claimed

(1) 5 Q. B. D. 368.

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15*l.* as the holder for value of a promissory note for that amount, of which he was the indorsee. At the trial it appeared that he had only lent 5*l.* on the note, and he therefore recovered judgment for that amount only. The costs as between party and party were accordingly taxed, on the lower scale fixed by the County Court Rules, 1889, at the sum of 2*l.* 13*s.* 6*d.*, and that sum and the 5*l.* were paid by the defendant to the plaintiff. The plaintiff's solicitors sent in their bill of costs to their client, amounting to 9*l.* 14*s.* 6*d.*, which included 2*l.* 8*s.* for Court fees, 2*l.* 4*s.* 6*d.* for counsel's fee, and other expenses out of pocket. Upon a taxation as between solicitor and client, upon the application of the plaintiff, the master taxed the bill upon the lower scale, allowing only the sum of 2*l.* 13*s.* 6*d.* which had been allowed between party and party. On appeal, Huddleston, B., directed the master to review his taxation.

The plaintiff appealed.

Nov. 6. *Crump, Q.C.*, (*W. H. C. Payne*, with him), for the plaintiff. The solicitors are not entitled to have their costs taxed upon the higher scale. The question arises under s. 118 of the County Courts Act, 1888, and the County Court Rules, 1889. (1) It is clear that under the Act and rules costs are to be paid on

(1) 51 & 52 Vict. c. 43, s. 118: "All costs and charges between party and party shall be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force. All costs and charges between solicitor and client shall, on the application either of the solicitor or client, but not otherwise, be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless the registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed; and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation."

Sect. 119: "The judge may award costs on any scale higher than that which would be otherwise applicable to the plaintiff on any amount recovered, however small, or to a defendant who successfully defends an action brought for any amount, however small, provided that the said judge certifies in writing that the action involved some novel or difficult point of law, or that the question

the higher or lower scale according to the amount recovered, and not according to the amount claimed.

R. M. Bray, for the solicitors. It is submitted that the foot-note at the end of the lower scale makes it clear that costs on the higher scale may be allowed where the "amount claimed" exceeds 10*l.* It cannot have been intended to give solicitors an interest in the subject-matter of the action. The language of the heading to the higher scale is sufficiently wide to cover the present case. It is the scale of costs to be paid to solicitors "where the subject-matter or the sum recovered exceeds 10*l.*" The "subject-matter" is defined with respect to interpleader proceedings, in a note at the end of the higher scale, but that definition is not intended to be exhaustive. Here the subject-matter of the action was the 15*l.* which the plaintiff claimed. Under previous County Courts Acts costs were payable according to the sum claimed, and not according to the sum recovered. If it had been intended to make so important a change as is suggested, express and clear words would have been used in the Act and rules now in force. If costs as between solicitor and client are to be paid according to the amount recovered, great hardship may result to solicitors. In the present case the costs out of pocket paid by the solicitors exceed the whole amount allowed on taxation.

Mathew, J. In this case I am of opinion that the view taken by the learned judge at chambers was wrong, and that the master's order ought to have been confirmed.

litigated was of importance to some class or body of persons, or of general or public interest."

The scale now in force is given in an Appendix to the County Court Rules, 1889.

The lower scale is headed "Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds 2*l.* and does not exceed 10*l.*," and at the end of the lower scale is the following note:—"N.B. No other costs are to be allowed than the above where the amount claimed does not exceed 10*l.*, unless the judge certifies under s. 119 of the County Courts Act, 1888."

The higher scale is headed:—"Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client where the subject-matter or the sum recovered exceeds 10*l.*"

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Mathew, J.

The question arises in the first instance upon s. 118 of the County Courts Act, 1888. Nothing can be more clear and explicit, it seems to me, than the provisions of that section upon this subject. It is clear that the legislature intended, with reference to these minor claims to be recovered in county courts, that there should not be the distinction which prevails in the High Court between party and party costs and costs as between solicitor and client. [The learned Judge read s. 118.] It was intended, except in the specified case of a written agreement, that there should be no distinction between the two sets of costs. Sect. 119 provides for costs upon the higher scale on the certificate of the judge, the certificate to contain statements of the matters mentioned in that section. That interpretation of s. 118 is borne out when the scale is looked at. The higher scale is headed, "Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the subject-matter or the sum recovered exceeds 10*l.*" Our attention, however, was called to the foot-note at the end of the lower scale, in which the words "amount claimed" are substituted for "amount recovered." The heading to the lower scale is, "Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds 2*l.* and does not exceed 10*l.*" It was argued that notwithstanding that heading it ought to be passed by, and its statement as well as the statements in the heading of the higher scale, and in the Act of Parliament, ought to be controlled because of the foot-note at the end of the lower scale, which is: "No other costs are to be allowed than the above where the amount claimed does not exceed 10*l.*, unless the judge certifies under section 119 of the County Courts Act, 1888." It is perfectly clear that the meaning of that note is to call attention to s. 119, which controls s. 118, according to its terms, but not to enlarge the meaning of the word "recovered" to the meaning of the word "claimed." There is this further observation to be made: the matter appears to have been clearly present to the attention of those who framed the rules, and the distinction between the amount recovered and the amount claimed appears to be manifested by the provision at the end of

the higher scale, that "where the costs of the defendant are being taxed the word 'recovered,' wherever it occurs in the scale, means 'claimed.'" That interpretation of the word "recovered" is confined to the particular case, and the reason is obvious. The defendant is entitled to resist the whole claim, and has his costs therefore taxed according to the amount claimed. But where a plaintiff brings a claim which he ought not to have brought, and for an amount in excess of that which he ought to have claimed, although, as appears from the present case, great hardship may be done to the plaintiff's solicitor, the legislature has not protected him against that. It has imposed upon him the obligation to protect himself by a written agreement with his client under s. 118.

Grantham, J. I am of the same opinion. In this case there may be a hardship upon the solicitor, brought about by the false statement made by his client, but we have to deal with the Act of Parliament, and I am clearly of opinion upon the construction of the Act and rules that he is only entitled to costs according to the "sum recovered."

Appeal allowed.

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Against this decision the solicitors appealed.

Dec. 11. *Channell, Q.C.*, and *R. M. Bray*, for the solicitors. The master thought that a solicitor could not recover from his client costs exceeding the amount prescribed by the rules for costs as between party and party, unless he had made a written agreement with the client as provided by s. 118 of the County Courts Act, 1888, and that, as the amount recovered did not exceed 10*l.*, the lower scale applied. There is apparently an inconsistency between the heading of the lower scale and the note at the end of it, but the two may be read so as to be consistent. The proper inference from the note at the end is that the taxing officer had a discretion to allow as between solicitor and client a sum exceeding that which is allowed as between party and party where the amount claimed exceeds 10*l.*, but less than 10*l.* is recovered. Unless this construction be adopted,

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the note at the end of the lower scale is useless. As between solicitor and client, the higher scale applies where the amount claimed exceeds 10*l*. As between solicitor and client, the amount claimed is the "subject-matter" of the action. No provision is made for the costs of a plaintiff's solicitor in case the plaintiff fails in his action. It could not have been intended that in such a case the solicitor should have no costs; the taxation must then be according to the amount claimed.

[Lord Esher, M.R. Had the master of the High Court any jurisdiction to tax these costs? Ought not the application, according to s. 118, to have been made to the registrar of the county court?]

Sect. 118 is only an enabling provision; it does not take away the jurisdiction of a master of the High Court under the Solicitors' Act of 1843 (6 & 7 Vict. c. 73), which extends to the taxation of all fees and disbursements of a solicitor. There are no negative words in s. 118.

Crump, Q.C., and *W. H. C. Payne*, for the plaintiff. Both scales make the sum recovered the test by which the allowance of costs is to be regulated. "Subject-matter" applies to a claim which is not a money demand. The rule is explicit that the lower scale is to apply between solicitor and client, as well as between party and party, when the amount recovered does not exceed 10*s.*; but, when the amount claimed does not exceed 10*l.*, the judge can certify, under s. 119, for a larger amount of costs.

[Lord Esher, M.R. Only plaintiff and defendant are mentioned in s. 119. I doubt whether it applies to solicitors.]

Then the judge cannot certify in favour of a solicitor. The note at the end of the lower scale does not apply to a taxation between solicitor and client.

Channell, Q.C., in reply.

Lord Esher, M.R. I do not think it is necessary for us to decide in the present case whether the taxation of the costs of a county court action is a matter exclusively for the county court, or whether the taxation may also take place before a master of the High Court. Certainly costs in a county court action ought not to be brought before a master of the High Court except under

special and exceptional circumstances. If it were to become the practice to take bills of costs in county court actions to masters of the High Court for taxation, the rules would have to be altered so as to prevent this from being done. I will assume, however, without deciding the point, that the taxation was properly brought before the master. That leaves us to determine the question whether, under the circumstances of this case, the master had power to allow, on a taxation between solicitor and client, something more than could be allowed under the lower scale as between party and party. Primâ facie the plaintiff in the present action was entitled to recover the full amount of the note. When a solicitor commences an action in a county court upon a claim for 15*l.*, he or the plaintiff is bound by the rules to pay the court fees prescribed in respect of a claim for the amount, and upon the hearing another considerable fee has to be paid on the footing of the claim being for a sum exceeding 10*l.* No doubt a solicitor is not bound to pay money out of pocket for his client; but in the ordinary course of business a solicitor does in fact pay court fees and other expenses on behalf of his client.

The action came on for trial in due course, and then the fact appeared, which, so far as we can see, had not been previously disclosed to the solicitors, and which the plaintiff may have thought was of no importance, that the plaintiff had only advanced the sum of 5*l.* upon the security of the note, and under these circumstances the plaintiff was only entitled to recover the 5*l.* which he had given for the note, and he did recover only 5*l.* The question is, What under such circumstances are the rights of the parties in respect of costs as between solicitor and client? The answer to this question depends upon the construction of ss. 118 and 119 of the County Courts Act, 1888, and the rules governing the scales of costs given in the Appendix to the County Court Rules, 1889. Those rules were made by a committee of county court judges, and allowed by the Lord Chancellor, under the authority conferred by s. 164 of the Act, and they have, I assume, a statutory force. We must, therefore, construe the Act and the rules together as one enactment, and we must endeavour to ascertain the meaning of each part of them from a consideration of the whole. The lower scale of costs

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is headed thus: "Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds 2*l.*, and does not exceed 10*l.*" Therefore, as between party and party as well as between solicitor and client, when the amount recovered exceeds 2*l.*, and does not exceed 10*l.*, the solicitor is absolutely entitled to the costs specified in the lower scale, and no discretion is given to the taxing officer. But then there comes this note at the end of the lower scale: "N.B. No other costs are to be allowed than the above where the amount claimed does not exceed 10*l.*, unless the judge certifies under s. 119 of the County Courts Act, 1888." Such a case must be within the lower scale; for, if the amount claimed does not exceed 10*l.*, the amount recovered cannot exceed 10*l.* But, even in that case, the judge may, under the circumstances which are mentioned in s. 119, certify for costs on a higher scale than that which otherwise would be applicable.

But when, as in the present case, the amount claimed exceeds 10*l.*, and the amount recovered is less than 10*l.*, the negative words of the note at the end of the lower scale do not apply. Those words apply only when the amount claimed does not exceed 10*l.* Then arises this question, whether the note does not, by necessary implication, mean that, though, when the amount claimed does not exceed 10*l.*, the costs must be governed by the lower scale, unless the judge certifies under s. 119, yet when the amount claimed exceeds 10*l.*, but less than 10*l.* is recovered, a different rule may apply as between solicitor and client. As between party and party, of course, nothing but the lower scale can apply, unless the judge certifies under s. 119. But I think that, when the amount claimed exceeds 10*l.*, and the amount recovered is less than 10*l.*, the taxing officer has a discretion to allow as between solicitor and client costs exceeding the lower scale, though he cannot allow more than the higher scale.

Does, then, s. 118 of the Act prevent this interpretation of the note at the end of the lower scale, so that the note is absolutely futile and can have no effect whatever? According to Mr. Crump's argument, the note at the head of the lower scale

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compels us to say that, when less than 10*l.* is recovered, the costs shall always be on the lower scale, and so the note at the end is absolutely futile. Sect. 118 says that no costs shall be allowed on taxation as between solicitor and client "which are not sanctioned by the scale then in force," unless the client has agreed in writing to pay them. The words "scale then in force" are capable of being read as meaning either of the two scales in force. The question is, Which of the two scales is meant? I do not see any reason why the words should not be read as meaning that in certain cases the taxing officer may act on the higher scale. Does s. 119 control s. 118 in this respect? In my opinion, s. 119 does not apply to a taxation between solicitor and client. The solicitor is not a plaintiff when his bill is being taxed, nor is the solicitor a defendant. In my opinion, s. 119 applies only to a taxation between party and party. Therefore, as it seems to me, there is nothing in either s. 118 or s. 119 which prevents us from giving some meaning to the rule, which it must be remembered has the force of a statute. We must, if it is possible, give a meaning to every part of the enactment, and I think the meaning is that, when the amount claimed is above 10*l.*, but the sum recovered is less than 10*l.*, the taxing officer has a discretion in taxing the costs as between solicitor and client to allow a larger sum than what is fixed by the lower scale, but not exceeding the higher scale. I do not say, and I do not think, that he is bound in every case to allow the higher scale; but he must exercise his discretion according to the circumstances of the particular case before him, and allow either the higher or the lower scale. If a solicitor knows, or if he ought, by making ordinary inquiries and taking ordinary care, to know, that his client cannot possibly recover more than 10*l.*, he ought not to bring the action for a sum exceeding 10*l.*; and if, with such knowledge or means of knowledge, he were to bring an action claiming more than 10*l.*, not only would it be very disgraceful conduct on the part of a solicitor, but I think that when the costs come to be taxed the master would exercise his discretion in not allowing the solicitor costs beyond the lower scale.

But, on the other hand, if the client by his wilfulness, or by

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his reticence, conceals from the solicitor, or does not give the solicitor the means of knowing, that he cannot recover more than 10*l.*, and thus directs or induces him to bring an action for a sum exceeding 10*l.*, and he recovers less than 10*l.*, the solicitor is not in fault. He has no right to shut out his client from bringing an action for more than 10*l.*, when he has led him to believe, either by concealment or affirmation, that he has a right to claim more than 10*l.* In such a case it would be a great injustice to the solicitor if he could not recover from his client even those sums which, on the faith of his client's representation, he had paid out of his own pocket in respect of the action. In such a case, if the client recovers only 10*l.* or less, I think the taxing officer would exercise his discretion by allowing the costs, as between the solicitor and his client, on the higher scale. In the present case the master has not exercised any discretion, and the case must be referred back to him in order that he may exercise that discretion which we have held that he possesses. The appeal must be allowed, with costs. I have assumed, for the purpose of my decision, that the Master of the High Court has jurisdiction; but this question may have to be considered on some future occasion.

KAY, L.J. I agree; but, as we are differing from the view taken by the Divisional Court, I think it is right that I should express my reasons in my own words. The action was brought in a county court, claiming 15*l.*; but the amount recovered by the plaintiff was only 5*l.* The costs of the plaintiff have been taxed in the county court, as between party and party, at 2*l.* 13*s.* 6*d.*, and that sum has been paid by the defendant to the plaintiff; the court fees and other charges were paid by the plaintiff's solicitors on the footing of the amount claimed being 15*l.*, and those items have been properly brought by the solicitor into his bill of costs against his own client. On the taxation of this bill at the instance of the client, the master has allowed only the sum of 2*l.* 13*s.* 6*d.*, which was allowed on the taxation as between party and party. The master thought that he was bound absolutely by the words which precede the lower scale of costs to allow only that scale, and that he had no discretion

whatever in the matter. At first I felt some difficulty in reconciling those words with the words of the note which follows the lower scale; but I think that the construction which the Master of the Rolls has suggested gets over the difficulty. The amount recovered in the present case being less than 10*l.*, I think it was right that the costs as between solicitor and client should be taxed on the lower scale. But then we must read all the words of the lower scale, and the note at the end seems to shew by implication that costs exceeding the lower scale may be allowed as between solicitor and client, although the sum recovered is not more than 10*l.*, if the claim was for a sum exceeding 10*l.* Sect. 118 of the Act says that no costs are to be allowed on a taxation as between solicitor and client "which are not sanctioned by the scale then in force." I am quite content to read the words "scale then in force" as meaning in the present case the lower scale; but, if the note at the end of that scale gives the taxing master a discretion when the amount claimed exceeds 10*l.*, though the amount recovered is less than 10*l.*, to allow more than the sums given in the lower scale, then the amount which he can so allow is allowed by the lower scale. The master held that he had no discretion at all. I think that the construction which the Master of the Rolls has suggested is the right one; it makes the note at the end of the lower scale consistent with the heading, and it gives the taxing master a discretion. What is the extent of his discretion? He has to decide which of the items in the solicitor's bill shall be disallowed or allowed on the higher or the lower scale. I do not wish to say anything to fetter his discretion. In my opinion, he will be entirely at liberty to disallow any of the payments, such, for example, as the fee paid to counsel, or to allow it either on the higher or the lower scale. He has not yet exercised his discretion at all, and the matter must go back to him in order that he may exercise it.

Appeal allowed.

Solicitors: *Langlois & Biden; Morris N. Fuller.*

W. L. C.

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[CROWN CASES RESERVED.]

THE QUEEN *v.* VREONES.

Criminal Law—Indictable Misdemeanour—Attempt to pervert the Course of Justice—Preparing False Evidence to be used in Arbitration.

The defendant was tried and convicted upon a count of an indictment alleging, in substance, that by the terms of a contract for the purchase of a cargo of wheat, to be shipped by the sellers from a port in the Black Sea to the buyer at the port of Bristol, it was provided that any dispute arising under the contract should be referred to two arbitrators, whose award should be final and conclusive, and might, upon the application of either contracting party, be made a rule of Court in England; that the defendant was appointed by the sellers to take samples of the cargo upon the arrival of the ship at Bristol; that such samples were then taken, and placed in bags sealed with the seals of the buyer and seller of the cargo, in accordance with the custom of merchants at the port, and for the purpose of being used as evidence before the arbitrators in case any arbitration was had under the contract; that the defendant afterwards, intending to deceive the arbitrators to be appointed under the contract, and wrongfully to make it appear to them that the bulk of the cargo was of better quality than it really was, so as to pervert the due course of law and justice, unlawfully and designedly removed the contents of the sealed bags and altered their character, and returned to the bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the cargo, and that afterwards the defendant forwarded the samples so altered to the London Corn Trade Association, with intent that the same should be used as evidence before such arbitrators, and thereby to injure and prejudice the buyer, and to pervert the due course of law and justice:—

Held, that the count stated an indictable misdemeanour at common law.

Case stated by Denman, J., for the opinion of the Court for the Consideration of Crown Cases Reserved.

At the Bristol Autumn Assizes, 1890, the defendant, Anastasios Vreones, and his wife, Blanche Vreones, were tried before Denman, J., upon an indictment containing four counts. The defendant was found guilty upon each count, and his wife was acquitted.

The first count of the indictment alleged that, before the commencement of the offence thereinafter mentioned, one Sidman Thomas Stephens, on behalf of himself and others, trading under the name, style, and firm of Wait & James, at Bristol, had entered into a contract with certain persons carrying on business under

the name, style, and firm of D. S. Sevastopulo & Co., for the purchase of a cargo of wheat then shipped, or about to be shipped, on board a vessel called the *Whinfield*, from Novorrissisk in the Black Sea to the port of Bristol, which said contract then contained a provision that, in the event of a dispute arising out of such contract, the same should be referred to two arbitrators, whose award should be conclusive and binding upon all disputing parties, and might, upon application of either contracting party, be made a rule of any of the divisions of Her Majesty's High Court of Justice in England; that the said ship *Whinfield* duly arrived at the said port of Bristol on March 15, 1890, with the said cargo of wheat, and it then became and was the custom of merchants using the said port to take from the said cargo samples of the wheat as composing the bulk of the same cargo, and, for the purpose of using the said samples in the event of a dispute between the buyer and the seller thereof as evidence as to the quality of the bulk of the said cargo in any arbitration which might be taken under the terms of the said contract, to seal such samples with the seals of the buyer and seller of such cargo, and forward the same so sealed and secured to the offices of the London Corn Trade Association, in 2, Lime Street Square, in the city of London; and, upon any such arbitration as aforesaid, the said samples so sealed and secured as aforesaid became and were evidence to be used before the arbitrators appointed to decide the question in dispute between the buyer and seller of such cargo; that at the time of the commission of the offence thereinafter mentioned, one Anastasios Vreones was a superintendent appointed by the said D. S. Sevastopulo & Co. to take samples of the said cargo, in accordance with the custom in this count before mentioned, and on March 17, 1890, and on divers other days between that day and the day of the taking of this inquisition, did so take such samples, to which samples the seals of the buyer and seller were duly affixed, in accordance with the said custom, and the said sealed samples then became and were evidence to be used in accordance with the terms of such contract upon any such arbitration as aforesaid; and that the said Anastasios Vreones and Blanche Vreones, having in their possession divers, to wit, ninety bags, each containing

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samples of the said cargo so taken from the said ship *Whinfield*, as aforesaid, and duly sealed as aforesaid, afterwards, to wit, on the said 17th day of March, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, contriving and intending to deceive the said arbitrators so to be appointed as aforesaid, and wrongfully to make it appear to the said arbitrators, and to cause and induce such arbitrators to believe, that the bulk of the said cargo was of better quality than it in fact was, and by fraudulent and deceitful means to cause and induce such arbitrators to give their award in favour of the said D. S. Sevastopulo & Co., so as to pervert the due course of law and justice, unlawfully, knowingly, and designedly did take and remove from the said ninety sealed sample bags the contents thereof, and unlawfully, knowingly, and designedly did alter the character of such contents, and return to such sample bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the said cargo; and, having so altered the character of such samples, did forward the same to the said London Corn Trade Association in such altered condition, with the intent that the same should be used before such arbitrators as aforesaid as such evidence as aforesaid, and thereby to injure and prejudice the said Sidman Thomas Stephens and others, and by the means aforesaid to pervert the due course of law and justice, against the peace of our Lady the Queen, her crown and dignity.

The other three counts charged the defendants with unlawfully uttering the samples as false tokens, whereby Stephens and others were defrauded and deprived of their just rights, and with unlawfully uttering them as false tokens, with intent to defraud Stephens and others, and the arbitrators; but, as no judgment was given upon the second, third, and fourth counts, it is unnecessary to set them out.

The following facts were proved at the trial, and stated in the case:—

On December 11, 1889, one Stephens, a corn merchant at Bristol, entered into a contract with one Sevastopulo for the purchase of a cargo of wheat, to arrive by SS. *Whinfield*, consist-

ing in part of "Azina wheat about as per sample No. 10," and in part of "Azina wheat about as per sample 'Rugby,' both samples old crop sealed and in our possession." About half the cargo was to consist of each quality. The samples referred to in the contract were called the "standard" samples.

The contract contained the following clauses:—

"Difference in quality shall not entitle the buyer to reject except under the award of arbitrators, or the committee of appeal, as the case may be. All disputes arising out of this contract, whether between the parties hereto, or between one of them and the trustee in bankruptcy of the other, shall be referred according to the rule endorsed. Power to either party to make this stipulation a rule of Court. Neither party, nor any one claiming under them, to bring any action until dispute settled by arbitration, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract."

By rule 9, endorsed on the contract: "When buyer requires arbitration on quality $\frac{\text{or}}{\text{and}}$ condition upon samples previously drawn and sealed, he shall make his claim and nominate his arbitrator within fourteen clear days of the final discharge of the shipment."

Rule 10 provided that "all disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be chosen by each party in difference, the two arbitrators having power to call in a third in case they shall deem it necessary." The rules further provided for the appointment of arbitrators in the cases of the neglect or refusal of one party to appoint an arbitrator, or of the death, refusal to act, or incapacity of any one or more of the arbitrators, and in other contingencies. A right of appeal was given to a committee of appeal appointed under the rules of the London Corn Trade Association, and various conditions had to be performed by the parties to the contract in order to obtain an arbitration, or to appeal to the committee of appeal from the decision of the arbitrators.

The standard samples were in this case as usual sealed by the sellers' broker in the presence of the buyer's broker, and kept by

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him; and on that being done, the money provided for by the contract was paid.

The *Whinfield* arrived on March 15, 1890, when, in accordance with the usual practice, a superintendent (in this case the defendant, A. Vreones) was appointed by the seller, and one Brockman, the buyer's under-foreman, by the buyer, to take samples of the wheat as it came up from the holds. It is unnecessary to describe the mode in which these samples are taken; but they are taken for the purpose of being used as evidence in case any arbitration should take place as to the quality of the cargo, and are called the "arbitration samples."

In the present case ninety of these samples were taken—forty-five of each kind of wheat—and, in the ordinary course, sealed by the defendant, as superintendent of the seller, and by the under-foreman of the buyer in the usual way, and at the same time the buyer's under-foreman, Brockman, took samples for the buyer's use from the same bulk sample from which the samples in these ninety bags were taken.

The fraud alleged in the indictment consisted in the fraudulent tampering with these arbitration samples after they were sealed by both parties. It was proved at the trial that the whole of these ninety arbitration samples were taken to the house in which the Vreones lodged before being sent to London to be kept by the London Corn Trade Association in order to be used in evidence in case of a dispute arising which should be referred to arbitration.

It was proved that the prisoner Anastasios Vreones, sometimes when his wife was present, sometimes when alone, sometimes through his wife, whom the jury acquitted as not being aware of any intention to defraud, tampered with these arbitration samples by pulling down a portion of the tops of the bags through the string on the side opposite to the seal, then cleaning the contents from cockles, rye, and small wheat by sifting, picking, and using flannel to which the cockles adhered, and in replacing the wheat so cleaned in the bags without breaking the seals, so as to produce a very much better sample than the standard samples, and than any of the other samples taken from the bulk. The motive suggested for this conduct was that in case of any dispute arising

as to the quality of the cargo the purchaser might be defeated by the production of the samples before any arbitrators who might be appointed.

No arbitrators were in fact appointed, nor did the purchaser take any steps in that direction, the reason assigned being that the arbitration samples as altered having been found on comparison superior to the standard sample, and to all the samples fairly taken by either or both parties, it would have been hopeless to proceed to arbitration.

The evidence shewed that there was no substantial difference between the cargo and the standard sample so far as the wheat No. 10 was concerned; but as regards the "Rugby" wheat it was proved that there was an inferiority which would amount to 112*l.* in value in that portion of the cargo as compared with the standard samples. The arbitration samples, as altered, shewed wheat of a very superior quality to either the bulk or the standard samples of this portion of the cargo, and also, but not to the same extent, as regards the wheat of quality No. 10.

At the end of the case for the prosecution it was urged by the counsel for Anastasios that the indictment ought to be quashed upon the ground that it contained no charge for which an indictment for misdemeanour could be supported.

Denman, J., left the case to the jury, and, upon their finding a verdict of guilty against Anastasios Vreones, bound the defendant over to come up for judgment when called upon.

The defendant's counsel moved in arrest of judgment in case that should be necessary.

The questions for the opinion of the Court were, with respect to the first count, whether it contained a statement of an indictable misdemeanour, and whether there was evidence in support of it.

C. W. Mathews, for the defendant. The first count of the indictment states no criminal offence. There is no averment that the evidence was ever tendered or used in any proceeding; nor that any legal proceeding was ever in existence in which it could be used; nor that any Court or legal officer was in existence before whom it could be used. The averments shew

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nothing more than an intention by the defendant to deceive in future proceedings, if they should ever be had. There is no act stated which is sufficiently proximate to the offence to make what the defendant did criminal. The defendant has done no more than put himself in a position to commit a fraud upon the contingency occurring of a reference to arbitration as provided by the contract. Under the rules endorsed upon the contract with respect to arbitration, various steps must be taken by the parties in order that the right to refer may occur, and various things could be done by either party which would prevent the arbitration being heard. In all the cases of indictments charging the manufacture or preferring of false evidence, the evidence has, in fact, been used before a properly constituted Court. It is conceded that, if the tampering with the samples had been done by two or more persons, an indictment against them for conspiracy would lie; but then the criminal offence is the agreement to bring about an unlawful result by unlawful means. So in indictments for subornation of perjury, it is the act of suborning the other person which is criminal. *Rex* v. *Crossley* (1) is not against my contention, because a false oath was in fact taken, though the affidavit was never used. The offence was in taking the false oath. *Rex* v. *Heath* (2) was decided on the same principle. The evidence given at the trial was not sufficient to support the first count of the indictment.

Poole, Q.C., (*Bernard Coleridge*, with him), for the Crown, was not heard.

LORD COLERIDGE, C.J. The first count of the indictment in substance charges the defendant with the misdemeanour of attempting, by the manufacture of false evidence, to mislead a judicial tribunal which might come into existence. If the act itself of the defendant was completed, I cannot doubt that to manufacture false evidence for the purpose of misleading a judicial tribunal is a misdemeanour. Here, in point of fact, no tribunal was misled, because the piece of evidence was not used;

(1) 7 T. R. 315. (2) Russ. & Ry. 184.

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Lord Coleridge, C.J.

but I am of opinion that that fact makes no difference; it is none the less a misdemeanour although the evidence was not used. All that the defendant could do to commit the offence he did. There was a contract for the sale of a cargo of wheat, and it provided a mode of settling by arbitration possible disputes which might arise. The particular piece of evidence, namely, the samples of wheat placed in sealed bags, would be, if not absolutely conclusive, of the greatest possible weight in determining any dispute as to the quality of the wheat sold. The contract provided that difference in quality should not entitle the buyer to reject except under the award of arbitrators, or the committee of appeal, as the case might be; that all disputes arising out of the contract should be referred to arbitration, and that where the buyer required arbitration on quality or condition upon samples previously drawn and sealed, he should make his claim and nominate his arbitrator within fourteen days of the final discharge of the shipment. In accordance with that stipulation samples were obtained, according to the usage, on behalf both of buyer and seller, and placed in sealed bags, to be sent to London for the purpose of being used by the tribunal appointed, if the case went to arbitration, under the contract. It was conceded by counsel for the defendant, and it is found in the case, that all that the defendant could do to tamper with those samples and corrupt the evidence upon which the tribunal was to act he did. He interfered with the perfection of the samples as samples, by making them shew a higher quality or condition of grain; and having done this in a most clever and fraudulent manner, without breaking the seals of the bags, the samples were transmitted to the Corn Trade Association in London, to be kept there, and used as evidence in the arbitration, in case an arbitration was held. They were not in fact so used; but I am of opinion that the defendant was none the less guilty of a punishable offence. I think that an attempt to pervert the course of justice is in itself a punishable misdemeanour; and though I should myself have thought so on the grounds of sense and reason, there is also plenty of authority to shew that it is a misdemeanour in point of law. There is, of course, no case in which the facts are exactly like these; but in

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Reg. v. *Crossley* (1) the principle which applies here was clearly laid down. The defendant in that case was charged with making a false affidavit. Lawrence, J., pointed out that it would be absurd to make the guilt of the defendant depend upon the subsequent use of the false affidavit, the defendant being equally guilty of perjury though no use had been afterwards made of it. I agree that this case is not exactly the same. In *Reg.* v. *Crossley* (1), when the false affidavit had been made, the defendant no doubt had completed the act which constituted the offence. Exactly the same principle applies here, because the offence of the defendant was completed, so far as his act could complete it, when he sent to London the samples which might or might not be used in the arbitration. I am, therefore, of opinion that the first count of the indictment contains a perfectly good statement of an offence at law, and that there was ample evidence to support the charge. It is not necessary to give any opinion upon the questions which are said to arise upon the other counts of the indictment. I am of opinion, for the reasons which I have given, that the conviction should be affirmed.

POLLOCK, B. I have come to the same conclusion. This is an indictment for a fraud or cheat at common law. If it had been charged as a cheat against a private individual, I should have felt bound to give effect to the argument of the defendant's counsel. In cases where a cheat or fraud against private individuals is charged, the two conditions—(1) that the act has been completed, and (2), that there has been injury to the individual —are conditions precedent to the offence. But this is not the case of a private fraud. It is an offence which comes within the description in East's Pleas of the Crown, c. 18, s. 4: "There is also another head of public cheats indictable at common law, which are levelled against the public justice of the kingdom, such as the doing of judicial acts without authority in the name of another"; and the author goes on to say: "There is a precedent of an indictment against a married woman for pretending to be a widow, and as such executing a bail bond to the

(1) 7 T. R. 315.

sheriff for one arrested on a bailable writ. This perhaps was considered as a fraud upon a public officer in the course of justice." I am quite clear that the condition precedent that there must be injury to the individual does not apply in the present case. It applies in cases of cheating or defrauding private individuals, because otherwise a mere naked lie might constitute an offence. But very different considerations apply to the class of cases in which the present is included. The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice. The question is, whether the sending of these adulterated samples, which by previous arrangement were to be sent to the association in London to be used by the arbitrators, is such an act as I have described. I think that it was. I think that the arbitrators are to be considered as a tribunal administering public justice. Such a tribunal is one specially sanctioned by Courts of law, and its decisions are enforced and carried out by the Courts of law. I am of opinion that by tampering with the evidence which was to be laid before that tribunal the defendant was interfering with the course of justice. I agree with my Lord that his act was completed.

STEPHEN, J. I am of opinion that the conviction should be affirmed on the grounds stated by the Lord Chief Justice.

CHARLES, J. I am of the same opinion.

LAWRANCE, J. I entirely agree.

Conviction affirmed.

Solicitor for the Crown: *The Solicitor to the Treasury.*
Solicitor for defendant: *William Webb.*

W. A.

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Jan. 15.

MONTGOMERIE AND OTHERS *v.* UNITED KINGDOM MUTUAL STEAMSHIP ASSOCIATION, LIMITED.

Insurance—Marine Insurance—Mutual Marine Insurance Association—Action against Association by Person not a Member.

The defendants, a mutual insurance association, by a policy of marine insurance in the form of a deed-poll, covenanted with a firm described therein as "a member," to pay losses upon a steamship. By the terms of the policy, the members having ships entered were to make good losses on the ship according to the provisions of the articles of association and the rules, one of which was an arbitration clause, by which the sum to be paid by the association in respect of any claim was to be settled by the committee; and the member, if he agreed to accept the amount so settled, was to be entitled to payment according to the mode of payment customary in the association; and, in case of difference, the matter in dispute was to be decided by arbitrators to be appointed by the committee and the member, the obtaining of a decision from whom was to be a condition precedent to the right of the member to maintain an action on the policy. The memorandum of association stated that the association was established for the "insurance of ships of members, and of ships which the members may be authorized to insure in their own names." The articles of association provided that "every person who, on behalf of himself or any other person or persons, insures or enters for protection any ship . . . shall as from the date of the commencement of such insurance or protection be deemed to have become a member of the association;" and that "all claims in respect of insurance or protection shall be made and enforced against the association only, and not against any member thereof; but the association shall not be liable to any member or other person for the amount of any loss, claim, or demand except to the extent to which the association is able to recover from the members or persons liable for the same." The plaintiffs, who were part-owners of the steamship insured, brought an action on the policy in their own names against the defendants to recover a loss on the vessel:—

Held, by Wright, J., that the action was not maintainable, as the terms of the policy expressly excluded liability on the part of the defendants to any person other than the firm therein described as "a member."

United Kingdom Mutual Steamship Assurance Association, Limited v. *Nevill* (19 Q. B. D. 110) considered.

CASE tried before Wright, J., without a jury. The action was brought by the plaintiffs, each of whom was owner of a one-sixty-fourth share in the steamship *William Hartmann*, to recover an alleged loss under a policy of insurance granted by the defendants. The facts and arguments sufficiently appear in the judgment.

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Sir C. Russell, Q.C., *Barnes, Q.C.*, and *Joseph Walton*, for the plaintiffs.

Cohen, Q.C., and *James Fox*, for the defendants.

WRIGHT, J. The action is brought on a policy in the form of a deed-poll, by which the United Kingdom Mutual Steamship Assurance Association, Limited, covenant with Perry, Raines & Co. to pay losses in certain events. Perry, Raines & Co. are described as having become a member of the association, and as having entered for insurance, in Class 1, a steamship, the *William Hartmann*, and the covenant is in consideration of the premises and of the observance by the insured of the rules and regulations. The agreement is, that the members having ships entered in the class shall, according to the provisions of the articles of association and the rules endorsed on the policy, and subject to a proviso, be liable to make good losses upon the ship which may attach to the policy. The proviso is: "In accordance with the articles of association and the rules of the class this policy, and the other policies of the association and class, are granted on this condition; and it is hereby specially agreed that the association under all their policies of insurance of the said class shall be liable in the whole only to the extent of so much of the said funds as the said association is able to recover from the members of the said class." The question is, whether the plaintiff Montgomerie and the other plaintiffs who are not named in the policy as covenantees are entitled to maintain an action in their own names against the United Kingdom Mutual Steamship Association for the amount of the loss which happened to the *William Hartmann* in the year 1883.

There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal, and not that of the agent; and, primâ facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal. To that rule there are, of course, many exceptions. First, the agent may be added as the party to the contract if he has so contracted, and is appointed as the party to be sued. Secondly, the principal may be excluded in several other cases.

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He may be excluded if the contract is made by a deed inter partes, to which the principal is no party. In that case, by ancient rule of common law, it does not matter whether the person made a party is or is not an agent. This, however, does not apply here, as this instrument is a deed-poll. Another exception is as regards bills and notes. If a person who is an agent makes himself a party in writing to a bill or note, by the law merchant a principal cannot be added. Another exception is that by usage, which is treated as forming part of the contract or of the law merchant, where there is a foreign principal, generally speaking the agent in England is the party to the contract, and not the foreign principal; but this is subject to certain limitations. Then a principal's liability may be limited, though not excluded. If the other party elects to sue the agent, he cannot afterwards sue the principal. Again, where the principal is an undisclosed principal, he must, if he sues, accept the facts as he finds them at the date of his disclosure, so far as those facts are consistent with reasonable and proper conduct on the part of the other party. Again, if the principal is sued, he is entitled to an allowance for payments which he may have made to his agent if the other party gave credit originally to that agent. Also, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.

These principles apply to marine insurance with very little modification, the chief modification of which I am aware being with reference to ratification. In matters of insurance, apparently in the interests of the assured, a person may become a principal by ratification although the agent did not insure and did not purport to insure on his behalf expressly or by name, if the agent, in fact, insured on behalf of those who might be interested, though the party was not at that moment ascertained; and a principal on whose behalf an insurance was actually made can ratify the insurance, even though at the time of ratification he knows that the subject of insurance, the vessel, or whatever it may have been, has been lost. I do not know of any other

exception; unless it be that a deed-poll in the case of an insurance can be sued upon not merely by the covenantee or other person who is named in it, but by the person interested on whose behalf the insurance was made. Primâ facie, therefore, the plaintiffs are entitled to sue in this case; but they may be excluded by the terms of the contract, and the real question is whether that is the case here.

Now, it was held in *United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (1), on this very form of contract, that the principal in this case, the plaintiff Montgomerie, is excluded from being sued for the premiums, and there appears to be a presumption that rules of that kind are what may be shortly described as correlative. If the plaintiff Montgomerie could not have been sued for the premium, or what is equivalent to the premium, namely, his contribution to the funds of the association, there appears to be a presumption that he and his co-plaintiffs would not be entitled to sue for that which is the consideration for the contribution, namely, the moneys insured. As Lord Blackburn said, in the case of the *Elbinger Actien-Gesellschaft* v. *Claye* (2): "The right to sue and liability to be sued upon a contract are reciprocal." He points out certain exceptions, and afterwards says: "I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit unless also he take the responsibility of it." The question, then, is, Have the parties so contracted that Montgomerie and his co-plaintiffs cannot sue, the alternative being that the action should have been brought in the name of Perry, Raines & Co.? I have come to the conclusion that the parties have so contracted. I think that the rules annexed to the policy and the articles of association which are incorporated with the policy shew plainly that it was the intention of the parties that the association should look to the member only for contribution, and should have to deal with and be entitled to say that they would deal with the member only in respect of the settlements of losses. Now the member here is, I think, clearly Perry, Raines & Co.; and with respect to this particular contract which was that sued on in *United Kingdom Mutual Steamship*

(1) 19 Q. B. D. 110. (2) Law Rep. 8 Q. B. 313, at pp. 316, 317.

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Assurance Co. v. *Nevill* (1), as distinguishable from that discussed in *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie* (2), the rule on which I place particular reliance is the arbitration clause. It was plainly in the contemplation of the parties that all settlements under these policies should be made by arbitration, and when you have to consider who it is that the parties intended should be entitled to sue, it is natural to look to the clause which provides the machinery under which the proceedings against the company are to be taken. The arbitration clause commences as follows: "The sum, if any, to be paid by this club in satisfaction of any claim shall in the first instance be settled by the committee, and the member"—not the party entitled—"if he agree to accept such sum (if any) as may be allowed by the committee in full satisfaction of his claim shall be entitled to demand payment so soon as the amount to be paid has been so ascertained and settled, but not before; and payment shall only be claimed according to the customary mode of payment in use in this club." It then provides that in case of difference the matter in dispute is to be decided by two arbitrators, one appointed by the committee, and the other by the member making the claim; and these words follow: "Provided always, and it is hereby expressly agreed, that no action shall be commenced, or other proceedings taken in any court or tribunal for recovery of any claim or demand under or by virtue of a policy in this club, unless and until the amount thereof in dispute has been decided by arbitration; and the obtaining such decision is hereby declared to be a condition precedent to the right of any member to maintain any such action or other proceeding." The clause has not been insisted upon as an answer to the action. I refer to it as shewing who it is that the parties thought was the proper person to deal with the association.

I now turn to the articles of association which are incorporated into the contract. But it may not be altogether immaterial to observe that the memorandum of association speaks only of "insurance of the ships of members and of ships which members may be authorized to insure in their own names." This leads to the

(1) 19 Q. B. D. 110. (2) 22 Q. B. D. 710.

inference that the distinction was present to the mind of the framer of that document. Though a member may insure on behalf of some one else it is the member, and not the person on whose behalf he insures, that is intended to be insured by the association. As regards the articles of association, by the interpretation clause "member" means member of the association. By the 3rd article of association "the association shall consist of the several persons who shall for the time being be insured or protected or shall have entered or agreed to enter ships for insurance or protection." Primâ facie that would seem to provide that everyone who had his interest protected by a policy should be in some sense a member of the association. But this is followed by the 4th article, "Definition of members. Every person who on behalf of himself or any other person or persons insures or enters for protection any ship or ships, or share or shares of a ship in the association, shall as from the date of the commencement of such insurance or protection be deemed to have become a member of the association." It appears to me that this is an express provision that those persons only are to be deemed to be members who have on behalf of themselves or any one else insured or entered for protection any ship or ships. By the 40th article: "Every engagement or liability of a member of the association in respect of any insurance or protection shall for all the purposes relative to enforcing such engagement or liability be deemed to be an engagement or liability by or on the part of such member to the association and not to any other member or members, and all moneys payable thereunder shall be paid to the association." By the 41st article: "All claims in respect of insurance or protection shall be made and enforced against the association only and not against any members thereof; but"—now come the words which at first sight appear to me to suggest a different construction—"the association shall not be liable to any member or other person for the amount of any loss, claim, or demand except to the extent of the funds which the association is able to recover from the members or persons liable for the same, and which are applicable to that purpose." But although primâ facie "member or other person" would mean member or other person interested, it appears to me to be consistent with

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the clause that the words "liable to any member or other person" point to liability to the "other person" through the hands of the member; and it is material to observe that in *United Kingdom Mutual Steamship Association* v. *Nevill* (1), Fry, L.J., expressly deals with these words, and, after considering the terms of the policy, points out that in his judgment the words "member or other person" mean member or person succeeding to or representing a member in the same way as personal representatives or a trustee in bankruptcy.

I need only now refer briefly to the judgments in that case. Lord Esher, M.R., says (2): "I think that in the case of such a contract as this under seal it is not allowable to go behind the instrument to make undisclosed principals responsible because they are not parties and have not attached their seals to the contract under seal." I do not think, however, that this consideration is the ground of his decision. In this case if there had been a deed inter partes it would have been an answer at once that Montgomerie and his co-plaintiffs were not parties to the deed. Lord Esher, M.R., also says (3): "The association can only sue the member as an assured for what is equivalent to the premium. It seems to follow that if they cannot sue him as an insurer, neither can they sue the person alleged to be his undisclosed principal as an insurer. If such person can be sued at all it must be as an assured for what is equivalent to the premium. But can he be so sued?" He goes on to give judgment to the effect that the principal corresponding to Montgomerie and the other co-plaintiffs in this case could not be sued for contributions, and then he says: "I do not think that he is a party to the contract as an undisclosed principal, although he may be a cestui que trust in respect of the proceeds the member may receive. Not being a party, he cannot sue or be sued on the contract." The only point for decision in that case was whether he could be sued; but the Master of the Rolls does in terms say that he cannot sue. Fry, L.J., appears to take the same view, though I cannot find that either he or Lopes, L.J., actually express an opinion on that particular point. But Fry, L.J., does

(1) 19 Q. B. D. 110, at p. 119. (2) At pp. 115, 116.

(3) At p. 116.

deal expressly with the words, "member or other person," in article 41 in the manner which I have mentioned.

In the case of *Great Britain A 1 Steamship Insurance Association* v. *Wyllie* (1), and in the case before Mathew, J., of *Ocean Iron Steamship Assurance Association* v. *Leslie*, which is reported in the note to that case, the question arose upon a Lloyd's policy, which is a totally different form of policy to the deed in this case, and a different conclusion was arrived at. In these cases the decision in *United Kingdom Mutual Steamship Assurance Association, Limited* v. *Nevill* (2), was expressly stated to be entirely consistent with the decision in *Great Britain A 1 Steamship Insurance Association* v. *Wyllie* (1), and the decision in the former case was put by the Court of Appeal in the latter case, and by Mathew, J., in *Ocean Iron Steamship Assurance Association* v. *Leslie* (1), on the ground that the association had contracted themselves out of the right to sue Nevill, who, but for the express contract, would have been liable to be sued for his contribution under the general rule of law, as it was held in these cases that Wyllie and Leslie could be sued for theirs.

For these reasons I think that the action cannot be maintained by Montgomerie and the co-plaintiffs against the defendants, and that the defendants are therefore entitled to judgment.

Judgment for the defendants.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Parker, Garrett, & Parker.*

(1) 22 Q. B. D. 710. (2) 19 Q. B. D. 110.

H. D. W.

C. A.

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Jan. 12, 13; *Feb.* 2.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* ASSESSMENT COMMITTEE OF SAINT MARY ABBOTTS, KENSINGTON.

Poor Rate—Objections to Valuation List—Assessment Committee, Procedure before—Right to appear by Agent—Union Assessment Committee Act, 1862 (25 *&* 26 *Vict. c.* 103), *ss.* 18, 19—*Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 1, 11, 19.

By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18, any person aggrieved by a valuation list may give notice of objection, and by s. 19 the assessment committee shall hold meetings for hearing objections, and "may at such meeting hear and determine such objections."

A householder objected to a valuation list, and, at the hearing before the assessment committee, did not appear personally, but was represented by another person, who claimed to be heard as his agent in support of the objections. The committee refused to hear such person, on the ground that their rule was not to hear any one other than the objector himself or a member of his family or household, or a member of the legal profession.

On an application for a mandamus to compel the committee to hear the agent:—

Held, that, as the statute gives the objector the right to appear and be heard in support of his objections, and contains no provision prohibiting him from appearing by an agent, the committee were bound to hear the agent, and a mandamus must be granted.

A RULE NISI had been obtained on behalf of Mr. Preston, a householder in the parish of Saint Mary Abbotts, Kensington, for a mandamus commanding the assessment committee to hear and determine the matter of certain objections to a valuation list made by or on behalf of the prosecutor, and to hear his agent and witnesses. The prosecutor, Mr. Preston, did not appear personally before the assessment committee in support of his objections, but deputed Mr. Fuller, who was a surveyor and the manager of a ratepayers' association of which Mr. Preston was a member, to act as his agent and appear in that capacity before the assessment committee in support of his objections to the valuation list. Mr. Fuller accordingly appeared and claimed to be heard on behalf of Mr. Preston, and also to give evidence as a skilled witness in the case. The assessment committee refused to hear Mr. Fuller, as Mr. Preston's agent, in support of the objections, on the ground that their rule was to hear no one other than

the objector himself or a member of his family or household, or a member of the legal profession; but they considered the facts without hearing him, and left the valuation list as it stood. (1)

Henn Collins, Q.C., and *J. V. Austin*, for the assessment committee, shewed cause. The assessment committee are empowered and required by statute to hear and determine objections to the valuation list, and therefore act in a judicial capacity, and have power to regulate their own proceedings, and determine what persons they will or will not hear. This is so in the case of magistrates in summary proceedings: *Collier* v. *Hicks* (2); also in the case of quarter sessions: *Ex parte Evans* (3); and in the case of an arbitrator: *In re Macqueen and the Nottingham Caledonian Society.* (4) If it were otherwise, there would be no check on the appointment of improper persons to appear and be heard as agents. The contention on behalf of the assessment committee is supported by the use of the word "decision" in 32 & 33 Vict. c. 67, s. 32.

[They also referred to *Willis* v. *Maclachlan* (5); *Reg.* v. *Mansel Jones* (6); *Reg.* v. *Williamson.* (7)]

Philbrick, Q.C., in support of the rule. Where a man is empowered by statute to do a particular act, he can, in the absence of express prohibition, appoint an agent to do such act on his behalf: *Jackson & Co.* v. *Napper; In re Schmidt's Trade-mark.* (8) It lies on those who object to the appointment

(1) By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18: . . . "Any person who may feel himself aggrieved by any valuation list, on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may" give notice in writing of his objection.

By s. 19, "The committee shall hold such meetings as they may think necessary for hearing objections to the valuation lists . . . and the committee may at such meeting hear and determine such objections."

The above Act is incorporated by s. 1 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), and ss. 19 and 32 of the latter Act make provision for appeals to special sessions against the decision of the assessment committee on objections made to the valuation list.

(2) 2 B. & Ad. 663.

(3) 9 Q. B. 279.

(4) 9 C. B. (N.S.) 793.

(5) 1 Ex. D. 376.

(6) 23 Q. B. D. 29.

(7) 59 L. J. (Q.B). 493.

(8) 35 Ch. D. 162.

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of an agent to make out their contention by shewing some prohibition, and here no such prohibition is to be found in the statutes. The assessment committee is not a judicial tribunal. They have no power to summon witnesses, or to compel the production of documents, or to administer an oath. He referred to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57, sub-s. 9.

POLLOCK, B. This case raises a somewhat novel question. An application is made for a mandamus to the assessment committee directing them to hear and determine the matter of certain objections to the valuation list. The householder objected to the list, and did not appear before the assessment committee himself, but named an agent who claimed to appear and conduct the case on his behalf. The assessment committee refused to hear him, and the ground of their objection to hearing him is, that he is not a counsel or solicitor, or a member of the household or family of the householder. This is clear from the affidavit of the agent himself, and from a letter of the assessment committee. Looking at the position of the assessment committee, it appears that they have a duty imposed upon them to hear and determine objections to the valuation list; but in other respects there is no fair analogy to the position of a court. That being so, nothing is to be gathered as to the right of audience, except from the terms of the Act itself. Sect. 19 of 25 & 26 Vict. c. 103, does not provide that they are to hear the objector, but that they are to hear the objection. It becomes necessary, therefore, to consider what the rule is as to the right to appoint an agent in such cases. The person taking the objection may be absent from the country, or may be unable or incompetent to conduct the appeal, and there may be some other person both able and willing to act in his place. Take, for instance, the case of a number of persons living in the same street who all take the same objection. The person who is best fitted to do the business—for instance, a surveyor—may be deputed to represent all the others. Could the assessment committee decline to hear him? I am of opinion that they could not. If that is so,

it is clear in the present case that the assessment committee ought to have heard the agent. Then, how should they hear him? He claimed to be heard as agent and also as a skilled witness. I think they were entitled to decline to hear him in such a double capacity, but they had no right absolutely to refuse to hear him; and, therefore, I think the mandamus ought to go.

CHARLES, J. The right of the ratepayers to be heard is a statutory right, and there is nothing in the statute to shew that they must appear in person. In *Jackson & Co.* v. *Napper; In re Schmidt's Trade-mark* (1) Stirling, J., stated the rule thus: "I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is sui juris to appoint an agent to act on his behalf. Of course, the legislature may do so; but, primâ facie, when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose." (2) In the present case I can find nothing to limit the common law right of the ratepayer to appoint an agent to act for him. It is contended that the assessment committee is in the position of a court or judicial tribunal, and can regulate their own procedure; but the authorities do not go so far. The statute provides that they are to hear and determine the objection, not that they are to hear the objector. They may determine how they will hear the objection, but they cannot refuse to hear the objector's agent, and that is what they claim to do.

Rule absolute.

P. B. H.

The assessment committee appealed.

Feb. 2. *J. V. Austin*, (*Henn Collins, Q.C.*), with him, for the assessment committee. The assessment committee are entrusted by statute with functions of a judicial nature. Their determina-

(1) 35 Ch. D. 162. (2) 35 Ch. D., at pp. 172, 173.

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tions are called by the statute decisions, and an appeal is given against them to special sessions by s. 19 of the Valuation (Metropolis) Act, 1869. They are, therefore, within the general rule that there is an inherent right in any court or tribunal to regulate its own procedure. It was competent for them to impose reasonable limits on the appearance of objectors through agents. It is a very inconvenient practice that persons should be allowed to appear in the double capacity of advocates and expert witnesses; and the rule laid down by the committee is intended to prevent that practice.

[FRY, L.J. The assessment committee refused to hear the agent as advocate. The question is not whether, after hearing him as advocate, they could refuse to allow him also to give evidence.

LORD ESHER, M.R. If the objector appeared personally and conducted his own case, could it be said that he could not give evidence?]

That would not be like the case of an expert.

[He cited the same authorities as were cited for the assessment committee in the Court below.]

Philbrick, *Q.C.*, and *Alexander Glen*, for the prosecutor, were not called upon.

LORD ESHER, M.R. The assessment committee have been called a court or tribunal, and spoken of as exercising judicial functions. They are a certain number of persons, in this case selected vestrymen, to whom power has been given by statute to hear objections, which have been made to the valuation list, and to decide whether such objections are well founded. I do not think that they are a court or a tribunal exercising judicial functions in the legal acceptation of the terms. The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by

any agent authorized by them. It was argued that it is inconvenient to hear a person as agent and then to allow him to be a witness. I do not think we are called on to determine any such point; but personally I can see no greater power to limit the persons whom the party objecting to the list may call as witnesses than to limit the persons from whom he may appoint an agent. No doubt the assessment committee would have some discretion, and might refuse to hear a manifestly improper person as agent; but I do not think that they have the power which they claim to exercise in this case. Therefore, the appeal must be dismissed.

BOWEN, L.J., concurred.

FRY, L.J. I agree. It does not appear to me that the assessment committee have any power to limit the common law right of a person, whom the statute entitles to appear in support of his objection to the list, to appear by an agent.

Appeal dismissed.

Solicitors for assessment committee: *Pontifex, Hewitt, & Pitt.*
Solicitors for prosecutor: *Nye, Greenwood, & Moreton.*

E. L.

THE LONDON BANK OF MEXICO AND SOUTH AMERICA, LIMITED *v.* APTHORPE.

1890 *Dec.* 16, 17. 1891 *Jan.* 19.

Revenue—Income Tax—Company residing in the United Kingdom—Trade carried on partly in the United Kingdom, partly Abroad—Profits earned Abroad not remitted to the United Kingdom—"Foreign Possessions"—5 & 6 Vict. c. 35, s. 100—16 & 17 Vict. c. 34, s. 2, Sched. D.

The appellants were a banking company carrying on business in London, and having branches in foreign countries. They were registered under the Joint Stock Companies Acts, and had their head office and seat of direction in London. General instructions and directions for management were issued from time to time from the head office to the managers of the foreign branches. The dividends of the company were paid in London, and for the purposes of such dividends no division was made between the profits earned in London and those earned by the foreign branches. Of the profits earned by the company at the foreign branches a portion was not remitted to this country:—

Held, that inasmuch as the business of the company was partly carried on in this country, the fact that a portion of the profits earned abroad was

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not remitted here did not exempt the company from liability to pay income-tax on such portion.

Colquhoun v. *Brooks* (14 App. Cas. 493) distinguished.

CASE stated by the Income Tax Commissioners under 43 & 44 Vict. c. 19, s. 59.

The facts of the case, so far as they are material, and the arguments of counsel, sufficiently appear from the judgment.

Gainsford Bruce, Q.C., and *H. Tindal Atkinson*, for the appellants.

Danckwerts, (*Sir R. Webster, A.G.*, with him), for the respondent.

Cur. adv. vult.

The judgment of the Court (Stephen and Charles, JJ.) was delivered by

CHARLES, J. This was an appeal by the London Bank of Mexico and South America against an assessment of 4341*l.* 13*s.* 4*d.* made on them under Sched. D of 16 & 17 Vict. c. 34, for the year ending April 5, 1889. The facts of the case were as follows.

The bank, which has branches in the city of Mexico and the city of Lima, is registered as a company under the Joint Stock Companies Acts. Its head office is in London, where its directors and shareholders meet, and from whence its affairs are directed and managed. The details of the management of the branches are conducted by managers, general directions and instructions for management being issued from the head office. The seat of power is in London with the directors. From the date of its establishment in 1877, the bank has carried on banking business in London (other than current banking accounts), and transacts in London the London business of the branches in the cities of Mexico and Lima. At these branches all usual banking business is conducted. By a law passed in the Republic of Mexico, in 1884, the rights of banks to circulate notes was limited to such banks as had obtained, or within a limited time might obtain, the authorization of the Federal executive. At the time of the enactment of this law, the London Bank of Mexico had not acquired, nor did it within the time limited acquire, that authorization. But mainly with the object of securing a continuance of the right to issue notes, the bank, on September 10,

1886, entered into an agreement with another banking company in Mexico, called the "Banco de Empleados," or "Banco Comercial," whereby that company ceded and transferred to the London Bank of Mexico a certain concession granted by the Federal Government to the company, including, amongst other things, the right of issuing notes. The agreement also contained provisions for the liquidation of the Banco de Empleados or Comercial. The London bank was to take charge of the liquidation and collect the debts. The net proceeds resulting from the collections, less 25 per cent., which was to be retained by the London bank, were to be distributed in certain fixed proportions among the shareholders. By way of consideration for this transfer, the London bank paid a sum nearly amounting to 20,000*l*. In the balance-sheet for 1887 this payment, it may be observed, is treated as an expenditure of capital, and in the profit and loss account there is debited by way of sinking fund as part of the annual expenditure a sum of 1000*l*. The amount of cash actually remitted to England was reduced by the deduction of the whole sum paid in Mexico to the Mexican bank. Upon these facts the appellant bank contended—1st, that the amount so paid was "wholly and exclusively laid out for the purposes of the adventure," and, therefore, properly deducted from assessable profits; and, 2nd, that even if not a proper deduction, it was still not assessable, inasmuch as no part of it either had been, or ever would be, actually received in the United Kingdom. Before discussing the correctness of these contentions, it is necessary to refer to some of the provisions of the Acts under which the assessment was made. By Sched. D of 16 & 17 Vict. c. 34, s. 2, duties are made payable "for and in respect of the annual profits and gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." By s. 5 of the same Act the duties thereby imposed are directed to be assessed under the

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regulations of 5 & 6 Vict. c. 35. By s. 100 of the last-named Act, the "cases" which can happen under Sched. D are indicated. The "first case" relates to "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule," and by the first rule applicable to this case the duty is to be computed on the full amount of the balance of the profits or gains of such trade, &c., on a fair and just average of three years without other deduction than is thereafter allowed. By the third rule no sum is allowed to be deducted from such profits or gains on account of any capital withdrawn therefrom, nor for any sum employed, or intended to be employed, as capital in such trade, &c., nor for any capital employed in improvement of premises occupied for the purposes of such trade, &c.

By the first rule, applicable to the first and second cases mentioned, it is enacted that, "in estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against, or be deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatsoever, not being money wholly and exclusively laid out or expended for the purposes of such trade, &c."

The fifth case relates to the duty to be charged "in respect of possessions in the British plantations in America or in any other of Her Majesty's dominions out of Great Britain and foreign possessions," and is to be computed on a sum not less than the full amount of the actual sums annually received in Great Britain. Sect. 159 enacts, "that in the computation of duty to be made in any of the cases mentioned, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act."

In order, therefore, to determine the question whether the sum paid by the appellant to the Banco de Empleados is a legitimate deduction, it is necessary to inquire whether the payment can be brought within any of the deductions expressly enumerated in the statute. It was suggested that the payment was "money wholly and exclusively laid out or expended for the purposes of trade," and so within the words of rule 1, cases 1 and 2, that it

was money necessarily paid for the effective carying on in Mexico of that branch of banking business which consists of the issue of notes, and was analogous to an annual payment to Government for a licence to carry on a trade which cannot be lawfully carried on without one. But we are unable to adopt this view of the facts of the case. It seems to us that the payment was really made for the acquisition of the whole business of the liquidating bank, including, it is true, the right to issue notes, but not limited to that right. It was, we think, a "capital" expenditure not made "wholly and exclusively" for the purposes of the trade or concern, but to buy a new and valuable business. Moreover, we are of opinion that, even if the money had been paid for the statutory power to issue notes, and for that alone, it would still not be a proper subject for deduction. It would remain money paid, in the nature of capital expenditure, to acquire a new, but by no means essential branch of banking business.

It was, however, further argued, that the bank is entitled to exemption on the ground that the amount in question has not been actually received in this country. The profits of a business carried on here and abroad are, it was said, so far as regards profits earned abroad, "foreign possessions," and fall under the fifth case of Sched. D, and not under the first. The case of *Colquhoun* v. *Brooks* (1) was cited in support of this view. There, the respondent carried on one business in England, and another, entirely separate from the first, in partnership with other persons in Australia. A large portion of his share of the profits made by the firm in Australia was not remitted to England, and the House of Lords held, that the unremitted profits and gains were "foreign possessions," and accordingly not chargeable with income-tax. The same conclusion obviously would have been arrived at had the respondent solely carried on a business abroad separate from his English business; and the judgments of the House undoubtedly establish the proposition that profits derived from trade carried on entirely elsewhere than in the United Kingdom are not assessable for income-tax until received here by the person entitled to them. But, in the present case, the bank carries on one business only, partly here and partly in

(1) 14 App. Cas. 493.

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Mexico, and we do not think it possible to draw a dividing line between its operations in this country and abroad.

The whole direction of the bank is in England, and there is no distinct Mexican business, and no division made between profits earned here and profits earned in Mexico. We cannot, therefore, regard the case cited as an authority for exempting this sum from chargeability. It is only applicable, we think, where the entire profits of the business are earned abroad, and is not applicable to a trader carrying on one single business partly in the United Kingdom and partly elsewhere. We may add, that we were pressed by the Crown to decide this case upon the direct authority of the cases of *Cesena Sulphur Company* v. *Nicholson* (1); *Calcutta Jute Mills Company* v. *Nicholson* (1), and *Imperial Continental Gas Association* v. *Nicholson*. (2) In all of these cases the appellant companies had their residence in London, but all their profits were earned abroad. It was nevertheless held, that all those profits, whether transmitted to England or not, were assessable. In the two cases first mentioned, the question, it is true, was not raised, whether profits earned abroad and not transmitted here were "foreign possessions," and the arguments were confined to the subject of the "residence" of the companies. But in the third case the question was fully raised and argued, and the Court decided that foreign earnings were not "foreign possessions" within the fifth case of Sched. D. Under these circumstances, although the cases were not actually overruled in *Colquhoun* v. *Brooks* (3), there can be no doubt that their authority is shaken. Indeed, Lord Herschell, in his judgment at page 510, expressly says they cannot be regarded as authorities determining the question, and Lord Macnaghten, at page 511, also regards the cases as not decisive. Having regard to these expressions of judicial opinion, we should hesitate to regard the cases as any longer of binding authority, and in giving our judgment for the Crown we do not act upon them. We regard the appellants' business as an English business with foreign branches, conducted in such a manner that it is impossible to divide the profits earned here and those earned abroad. We

(1) 1 Ex. D. 428. (2) 37 L. T. (N.S.) 717.

(3) 14 App. Cas. 493.

therefore think the language of Sched. D, case 1, applicable, and give our judgment on this ground, as on the other ground taken, in favour of the Crown, with costs.

Judgment for the respondent.

Solicitors for appellants: *Flux, Son & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. F. C.

EX PARTE THE COUNTY COUNCIL OF KENT AND THE COUNCIL OF THE BOROUGH OF DOVER. IN RE THE LOCAL GOVERNMENT ACT, 1888.

EX PARTE THE COUNTY COUNCIL OF KENT AND THE COUNCIL OF THE BOROUGH OF SANDWICH. IN RE THE LOCAL GOVERNMENT ACT, 1888.

1890 *Nov.* 21.
1891 *Jan.* 13, 30.

Local Government—Borough Rate—County Fund—Costs of Quarter Sessions and Petty Sessions in Boroughs with Population of 10,000 *or upwards having a separate Court of Quarter Sessions—Courts of Quarter Sessions and Petty Sessions in Boroughs with Population under* 10,000 *having a separate Court of Quarter Sessions—Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 169, 248, *sub-ss.* 2, 5—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 45), *s.* 35, *sub-ss.* 2, 5, *s.* 38, *sub-s.* 5, *s.* 100.

Semble, that under the Local Government Act, 1888, where the population of a borough having a separate court of quarter sessions is 10,000 or upwards, the expenses of quarter and petty sessions are payable out of the borough rates; where the population is less than 10,000, out of the county rates.

QUESTIONS submitted to the Court under s. 29 of the Local Government Act, 1888, by the County Council of Kent and the Councils of the boroughs of Dover and Sandwich, each of which has a separate court of quarter sessions. The population of the borough of Dover was at the last census above, that of Sandwich under, 10,000. The questions submitted are stated in the judgment of the Court.

Channell, Q.C., and *Gore*, for the County Council of Kent.

Henn Collins, Q.C., and *R. S. Wright*, for the Council of the borough of Dover.

Crump, Q.C., and *H. F. Dickens*, for the Council of the borough of Sandwich.

Cur. adv. vult.

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Jan. 31. The judgment of the Court (Stephen and Vaughan Williams, JJ.) was read by

VAUGHAN WILLIAMS, J. The scheme of the Local Government Act, 1888, seems to be generally to transfer to the county council all the administrative functions of quarter sessions, but to reserve to the justices whether in or out of session the judicial functions. The judicial functions of the justices being thus reserved to, among others, the borough quarter sessions, the questions which are put to the Court relate mainly to the limits of jurisdiction of county and borough quarter sessions and of petty sessional divisions within the limits of the same respectively, and the duty, liability, and power of borough quarter sessions and borough councils as to the expenses of quarter sessions and of the justices in or out of session.

These matters differ according to the size and the population of the quarter sessions boroughs. Those with a population of 50,000 and over are made county boroughs, and with reference to these no question is raised before us. Those with populations over 10,000 having a separate court of quarter sessions are made part and parcel of the county, and are thus subject generally to county rates, but retain the power and duty to raise by rates the expenses of the borough quarter sessions and of petty sessional divisions within the area of the jurisdiction of the borough quarter sessions, and pro tanto are exempted from proportionate contribution to the expenses of county sessions. Quarter sessions boroughs with a population of less than 10,000, though retaining their judicial functions, have neither the duty nor the power to raise the expenses of sessions by rates, such expenses being a general county purpose: sect. 35, sub-s. 5 of the Local Government Act, 1888. (1)

(1) By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35: "In the case of a quarter sessions borough, not being one of the boroughs named in the third schedule to this Act, but containing according to the census of 1881 a population of ten thousand or upwards, the following provisions shall . . . apply:—

Sub-s. 2. "Where such borough is at the passing of this Act exempt, in whole or in part, from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situated are authorized to incur cost, the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of

This seems to us to be the general scheme of the Act. We are not unaware that there are provisions in it (particularly in s. 35, costs incurred for any such purpose, nor in the case of a partial exemption, be so assessed for any larger sum than such as will give effect to that exemption; but this exemption shall not extend to any costs incurred for the purpose of any powers, duties, or liabilities of the justices of the borough, which will by virtue of this Act be exercised or discharged by the county council, nor to any costs of or incidental to the assizes of the county."

Sub-s. 5: "The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough may be assessed to county contributions, and all costs of prosecutions mentioned in s. 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund."

By s. 38: "Where a borough having a separate court of quarter sessions contained according to the census of 1881 a population of less than ten thousand, the following provisions shall . . . apply:—

Sub-s. 5: "The area of the borough shall for the purposes of the above-mentioned Acts (i.e., Acts relating to the sale of food and drugs, reformatory schools, and other matters) and all other administrative purposes of the county council, be included in the county, as if the borough had not a separate court of quarter sessions, and accordingly shall be subject to the authority of the county council and the county coroners, and may be annexed by the county council to a coroner's district of the county, and the parishes in the borough shall be liable to be assessed to all county contributions."

By s. 100: "The costs of assizes and of quarter and petty sessions include such of the following costs as are applicable, that is to say, the costs of maintaining and providing the courts and offices and the judges' lodgings, the salaries and remuneration of a chairman of quarter sessions, clerks of assize, clerks of the peace, clerks of the justices, and other officers, the costs of the jury lists, the costs of rewards ordered to be paid by the court, the costs of prosecutions including the costs of the defendants' witnesses, and all other costs incidental to the assizes, quarter sessions, petty sessions, or the judges; but nothing shall require a quarter sessions borough to contribute towards the costs of prosecution at assizes except in the case of prisoners committed for trial from the borough."

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 169: "A municipal corporation of a borough having a separate court of quarter sessions shall be liable to pay the costs and expenses attending the prosecution of any felony committed or supposed to have been committed in the borough, and of any other offence committed or supposed to have been committed in the borough, the costs and expenses attending the prosecution whereof are by law payable as in the case of a felony. The amount of those costs and expenses shall be ascertained as directed by law, and the order of the court for the payment thereof shall be directed to the treasurer of the borough."

By s. 248, sub-s. 2, "The jurisdiction, powers, and authorities of the court of quarter sessions, recorder, coroner, and clerk of the peace for each of the five boroughs—i.e., 'the boroughs of Hastings, Sandwich, Dover, Hythe,

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sub-s. 5) which are difficult to reconcile with this view; but it seems to us that a construction must be put upon them consistent with the Act as a whole. This being the scheme of the Act, it is necessary, in order to answer the questions before us, to see how the details are worked out.

Sect. 35 deals with boroughs with a population of 10,000 and over. It expressly provides that such boroughs shall form a part of the county for the purposes of the Act, and that the parishes in the boroughs shall, subject to the exemptions in the Act contained, be liable to be assessed to county contributions like the rest of the county. These exemptions appear by sub-s. 2 of s. 35 to be the exemptions in force at the time of the passing of the Local Government Act by virtue of the Municipal Corporations Act, 1882, save that the exemption is not to extend to any costs incurred for the purpose of any powers, duties, or liabilities of justices of the borough which by virtue of the Act will be discharged by the county council, nor to any costs of or incidental to the assizes of the county, nor, indeed, to the costs of prosecutions in the borough, since s. 35, sub-s. 5, expressly repeals s. 169 of the Municipal Corporations Act, 1882, and provides that these costs shall be paid out of the county fund.

The exemption seems only to extend in terms to the parishes in the quarter sessions borough, and the words "quarter sessions borough" in this section seem only to include that which is included in the borough by the Municipal Corporations Act, 1882, i.e., that which is within the boundaries of the borough, and not the parishes in the liberties, which, though within the jurisdiction of the borough quarter sessions, form no part of the borough.

being four of the Cinque Ports, and the borough of Rye' (sub-s. 1)—shall extend to the non-corporate members and liberties thereof, and to such corporate members thereof as have not a separate court of quarter sessions."

Sub-s. 5. "The non-corporate members and liberties of the five boroughs and such corporate members thereof as have not a separate court of quarter sessions shall be charged by the respective courts of quarter sessions of the five boroughs with a due proportion of all the expenses of the five boroughs, to the payment whereof rates in the nature of county rates are applicable; and such rates may be assessed and levied in the manner in which rates of that description were assessed and levied before the passing of the Municipal Corporations Act, 1835, under any enactment then in force, but subject to the operation of any subsequent enactment affecting the same."

The borough quarter sessions of Dover have, it is stated in the case, by immemorial usage made rates on the liberties in respect of their proportion of expenses of borough quarter sessions. By s. 248, sub-s. 2, of the Municipal Corporations Act, 1882, the jurisdiction, powers, and authorities of the court of quarter sessions, recorder, coroner, and clerk of the peace of Sandwich and Dover extend to the non-corporate members and liberties thereof and to such corporate members as have not a separate court of quarter sessions; and by sub-s. 5 the non-corporate members and liberties of the said boroughs and the said corporate members shall be charged by the respective courts of quarter sessions with a due proportion of the expenses, to the payment whereof rates in the nature of county rates are applicable, and such rates may be assessed and levied as before the Municipal Corporations Act, 1835, under any enactment then in force. It is not easy to suppose that the legislature meant that these liberties should bear a double burden of taxation in respect of the administration of justice, which they would do if contribution had to be made for those purposes both to the borough fund and the county fund; but, on the other hand, it is not easy to suppose that the legislature meant that the borough should, as such, bear the expenses of the administration of justice outside its local limits. On the whole, we think that it was intended to leave the judicial jurisdiction of borough quarter sessions unaltered as to local limit, and that the exemption was also intended to be left unaltered, and therefore the exemption of the borough will extend to the liberties. The words reserving the exemption to the boroughs seem capable of bearing this construction, and it is the only construction which seems to avoid practical injustice.

Of course, it is contrary to the general rules of construction to give a different meaning to the word "borough" in different portions of the same section; but this may be done where the sense of the section clearly requires it, and we think that the sense of the Act does require it in the present case. The provision of s. 35, sub-s. 5, to which we have already alluded, which it is difficult to reconcile with our view, is the following: "The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough may be assessed

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to county contributions, and all costs of prosecutions mentioned in s. 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund." The word sessions may probably be read as meaning sessions generally—i.e., quarter and petty sessions—throughout the county; but the words must be read as subject to express provisions contained in other portions of the Act, and, if so, would not apply to sessions in a quarter sessions borough having a population of 10,000 and upwards, and a separate court of quarter sessions, though it would apply to sessions in quarter sessions boroughs having a population of less than 10,000. The proviso at the end of the section repealing s. 169 of the Municipal Corporations Act, 1882, and making the costs of prosecutions at quarter sessions payable out of the county fund, of course favours the view that the word "sessions" at the beginning of the section was intended to apply to borough quarter sessions in boroughs with a population exceeding 10,000. Probably, however, this was a slip of the draftsman, and the repeal should have been so limited as not to extend to these boroughs. The slip, however, is of no great practical importance, since it probably will make no great difference to the burden of these boroughs whether they pay the costs of the prosecutions at their own quarter sessions, or whether they bear a proportion of the costs of the prosecutions at quarter sessions throughout the county. Sect. 100, in the definition of costs of assizes and of quarter and petty sessions, somewhat favours our construction, because the proviso at the end of that definition seems to limit the application of the words "costs of assizes" in sub-s. 5 of s. 35 in somewhat the same way in which we suggest that the words "costs of sessions" should be limited in their application in the same subsection.

Sect. 38 deals with quarter sessions boroughs with a population of less than 10,000. Sub-s. 5 makes the area of the borough for the purpose of the Local Government Act and certain other Acts part of the county, as if the borough had not a separate court of quarter sessions, and says that the parishes in the borough shall be liable to be assessed to all county contributions. There is no exemption, and the consequence is that unless the borough is relieved from the obligation to pay quarter sessions expenses, by

a borough rate, the borough would be subject to double burden —once to county rate for proportions of sessions expenses, and once to borough rate for the actual expenses.

As to the borough of Dover. The questions submitted to the Court for decision and our answers to them are as follows:—

1. Is the power and duty of the borough court of quarter sessions of making a rate in the nature of a county rate in the liberties of the borough taken away by the Act or transferred to the county council?—No; but it is limited to expenses of borough quarter sessions. County contribution will be levied by the council directly, not as under s. 152 of the Municipal Corporations Act, 1882.

2. (*a*) Is the power and duty of paying the costs of the quarter sessions of the borough and liberties, or the borough or liberties, transferred to the county council?—No. (*b*) Are the borough and liberties, or is the borough or are the liberties, subject to county rates for the costs of county quarter sessions, and are the power and duties of making rates for that purpose in the borough and liberties, or the borough or liberties, transferred to the county council?—No.

3. Does the power and duty of raising by rate the salary of the recorder remain in the borough council and the quarter sessions of the borough and liberties, or in the borough council or the quarter sessions, or is the power and duty of paying such salary transferred to the county council?—This remains in the borough council with appeal to quarter sessions, as provided in Part VII. of the Municipal Corporations Act, 1882.

4. (*a*) Is the power and duty of paying the salary of the borough clerk to the justices transferred to the county council?—No; it remains as before the passing of the Act. (*b*) Is the power and duty of paying the salaries of the justices' clerks in the liberties transferred to the county council?—No. (*c*) Are the borough and liberties, or is the borough or are the liberties, subject to county rates for the salaries of the clerks to the justices of the county, and is the power and duty of making rates for that purpose in the borough and liberties, or the borough or liberties, transferred to the county council?—No. (*d*) Have the Cinque Ports justices become justices of petty sessional divisions or quasi

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petty sessional divisions of the county so that offences committed in the Thanet and Deal liberties of the borough have become offences committed in the county and triable therein?—No.

5. (*a*) Is the power and duty of paying the fees and costs of the borough clerk to the justices transferred to the county council?—No; it remains as before. (*b*) Is the power and duty of paying the fees and costs of the justices' clerks in the liberties transferred to the county council?—No. (*c*) Are the borough and liberties, or is the borough or are the liberties, subject to a county rate for the fees and costs of the justices' clerks of the county, and is the power and duty of making rates for that purpose in the borough and liberties, or the borough or liberties, transferred to the county council?—No.

6. Are the fines imposed by the justices of the borough and liberties, or by the justices of the borough or liberties, and each of them, to be credited to the borough and liberty rates, or the borough or liberty rates, or are they transferred to the county council?—No; they are paid to the credit of the borough rates and liberty rates as before.

7. (*a*) Is the power and duty of paying the expenses of prosecutions in indictable offences incurred in the borough and liberties, or the borough or liberties, transferred to the county council?—Yes; because s. 35, sub-s. 5, repeals s. 169 of the Municipal Corporations Act, 1882, and makes those costs payable out of the county fund. (*b*) Are the borough and liberties, or is the borough or are the liberties, subject to county rates for expenses of prosecutions in indictable offences incurred in the county, and is the power and duty of making rates for that purpose in them or either of them transferred to the county council?—Yes; because the section whereby they were liable to pay them has been repealed.

8. (*a*) Is the power and duty of paying the costs of petty sessions in the borough and liberties, or the borough or liberties, transferred to the county council?—No. (*b*) Are the borough and liberties, or is the borough or are the liberties, subject to county rates for the costs of county petty sessions, and is the power and duty of making rates for that purpose in them or either of them transferred to the county council?—No.

9. (*a*) Is the ancient jurisdiction of the coroner of the borough over the liberties transferred to the coroners of the county?—We think not. (*b*) Is the power and duty of appointing and paying a coroner for the liberties transferred to the county council?—No. (*c*) Are the liberties subject to county rates for the salaries and expenses of the coroners of the county, and is the power and duty of making rates for that purpose in the liberties transferred to the county council?—No.

10. (*a*) Is the power and duty of appointing and paying the inspector of weights and measures in the liberties transferred to the county council?—No. (*b*) Are the liberties subject to county rates for the expenses of inspection of weights and measures, and is the power and duty of making rates for that purpose in the liberties transferred to the county council?—No.

As to the borough of Sandwich. 1. (*a*) Since the Local Government Act, 1888, came into force, should such portion of the fines and fees for offences committed and matters arising in the borough of Sandwich or in the borough of Ramsgate (now a corporate member of Sandwich), or in the non-corporate liberties of Sandwich, as was theretofore received by the clerks to the said borough and Cinque Ports justices respectively in the borough of Sandwich, and in the Ramsgate and Deal liberties of the Cinque Port of Sandwich, and theretofore paid to the treasurer of the borough of Sandwich, or any of them, be transferred and paid to the county treasurers of Kent for the use of the county council of Kent?—Yes. (*b*) Ought the prisoners committed for trial by the Cinque Ports justices in the corporate member and non-corporate liberties of Sandwich, or either of them, for offences perpetrated in the corporate member and non-corporate liberties, or either of them, to be committed for trial to the quarter sessions for the borough of Sandwich, or to the quarter sessions for the county of Kent?—To the quarter sessions for the borough of Sandwich. (*c*) Ought the prisoners committed for trial by the county justices in the portion of the parish of St. Lawrence added to the borough of Ramsgate, for offences perpetrated therein, to be committed for trial to the quarter sessions for the borough of Sandwich, or to the quarter sessions for the county of Kent?—To the quarter sessions for the borough of Sandwich.

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2. Is the duty of paying the salaries of the clerks to the justices of the Cinque Ports for the petty sessional divisions of Ramsgate and Deal, or of either of them, or of the clerk to the justices of the borough of Sandwich, or of paying the expenses of petty sessions held for the borough or liberties, or of any of them, transferred to the county council of Kent?—Yes.

3. Is the duty of paying the costs of the prosecutions at the court of quarter sessions of the borough of Sandwich, under s. 169 of the Municipal Corporations Act, 1882, or of indictable offences summarily dealt with, where the offence has been committed in the borough of Sandwich, or where the offence has been committed in the borough of Ramsgate, or in the non-corporate liberties of Sandwich, or in any of such cases, transferred to the county council of Kent?—Yes, in all the cases mentioned.

4. Is the power and duty of paying the expenses of the court of quarter sessions of Sandwich, and the salaries and remuneration of the recorder and clerk of the peace of the borough and liberties, or of any of them, transferred to the county council of Kent?—Yes.

5. Is the power and duty of appointing a coroner for the borough of Ramsgate, and of paying the expenses of inquisitions and inquests held by such coroner, transferred to the county council of Kent; and, if not, in whom is the power and duty now vested?—It is transferred to the county council of Kent.

6. Ought the county council of Kent to pay for the maintenance in industrial or reformatory schools of the persons sent to them by the quarter sessions of Sandwich or the justices of Sandwich, or by the respective justices exercising jurisdiction within the borough of Ramsgate or the non-corporate liberties of Sandwich, from the borough of Sandwich or the borough of Ramsgate, or the non-corporate liberties of Sandwich, or any of them, either before or after the Local Government Act, 1888, came into force?—Yes; but the answer applies only to the period after the Local Government Act, 1888, came into force. The Court is not bound to answer as to the preceding period.

7. Is the power of appointing an inspector of weights and measures for the borough of Ramsgate, and of paying the salaries

and expenses of such inspectors, transferred to the county council of Kent; and, if not, in whom is the power now vested?—It is transferred to the county council of Kent.

8. Are the borough and liberties, or is the borough of Sandwich or the borough of Ramsgate, or are the non-corporate liberties of Sandwich, or either of them, subject to county rates—(*a*) for the cost of county quarter sessions; (*b*) for the salaries and fees and costs of the clerks to the justices of the county; (*c*) for the costs and expenses in summary indictable offences in the county (outside the jurisdiction of the borough and liberties), and of the expenses of prosecutions at county quarter sessions; (*d*) for the costs of county petty sessions; (*e*) for the expenses of inspectors of weights and measures in the county; (*f*) for the expenses of county coroners; (*g*) for the maintenance in reformatory or industrial schools of persons sent to them by the justices of the county? And are the powers and duties of making rates for that purpose in them, or either of them, transferred to the county council?—Yes, as to all these questions.

We hope that the principle upon which these answers are given sufficiently appears. We may in some cases have been mistaken, owing to the exact facts not having been brought to our notice. Should such cases arise, our answers can be reconsidered on the application of any of the parties. To give an example: question 7 of the second series relates to the appointment of an inspector of weights and measures for the borough of Ramsgate. When the case was argued, the necessary facts were not before us. We have since looked at the Weights and Measures Act, 1878, and it seems to us that the appointment must have been made pursuant to the last clause of s. 50. Generally speaking, the Act only gives the appointment to the council of a borough which has a separate court of quarter sessions. This would not apply to Ramsgate; and if the borough of Ramsgate, and not the borough of Sandwich, appointed, it would be under that clause which says: "Where at the commencement of this Act legal local standards are provided and inspectors are appointed by the council of a borough not having a separate court of quarter sessions, that council shall continue to be the local authority until they otherwise resolve." Be it, however, as it may, whether

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Sandwich or Ramsgate appointed, our answer to the question would be the same.

Judgment accordingly.

Solicitors for county council of Kent: *Palmer & Bull, for Brennan & Turner, Maidstone.*

Solicitors for council of the borough of Dover: *Sharpe, Parkers, Pritchard, & Sharpe, for Knocker, Dover.*

Solicitors for council of the borough of Sandwich: *Prior, Church, & Adams, for Baker, Sandwich.*

H. D. W.

Jan. 13.

VERNON AND OTHERS *v.* WATSON.

Friendly Society—Misappropriation by Officer—Conviction under Statute—Imprisonment for Default of Payment—Conviction and Punishment a Bar to Remedy by Action—Friendly Societies Act, 1875 (38 *&* 39 *Vict. c.* 60), *s.* 16, *sub-s.* 9.

The defendant, an officer of a friendly society, was charged under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16, sub-s. 9, with misappropriation of money, and an order for payment was made. He made default in complying with the order, and was imprisoned for two months, under the same section. The plaintiffs, the trustees of the society, sued to recover the amount which the defendant ought to have paid:—

Held, that, as the plaintiffs had availed themselves of the remedy provided by statute, and the defendant had been convicted and punished under the proceedings so taken, such conviction and punishment was a bar to the plaintiffs' remedy by action.

Knight v. *Whitmore* (53 L. T. (N.S.) 233) followed.

APPEAL from the County Court of Derbyshire at Derby.

The defendant was an officer of a friendly society, and was charged under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16, sub-s. 9 (1), with the misappropriation of a sum of

(1) 38 & 39 Vict. c. 60, s. 16, sub-s. 9: "If any person obtains possession by false representation or imposition of any property of a society, or having the same in his possession, withholds or misapplies the same, or wilfully applies any part thereof to purposes other than those expressed or directed in the rules of the society and authorized by this Act, he shall, on the complaint of the society, or of any member authorized by the society, or the trustees or committee of management of the same, or by the central office, or of the chief registrar or any assistant registrar by his authority, be liable on summary conviction to a penalty not exceeding twenty pounds and costs, and to be ordered to deliver up all such property, or to repay all

money, and was convicted, and ordered to repay the money and to pay a penalty. He made default in complying with the order for payment, and was imprisoned for a period of two months, with hard labour, and served the sentence. The plaintiffs, the trustees of the society, applied to the magistrates' clerk for a distress warrant to enable them to realize the amount due. The magistrates' clerk, being of opinion that the case came within 11 & 12 Vict. c. 43, s. 23, and that s. 19 of the same Act did not apply, refused the warrant. The plaintiffs then issued a specially indorsed writ, and applied for judgment under Order XIV. Leave to defend was given, and the case was ordered to be tried in the county court under s. 65 of the County Courts Act, 1888 (51 & 52 Vict. c. 43). The judge of the county court gave judgment for the plaintiffs.

J. H. Etherington Smith, for the defendant, in support of the appeal. The action will not lie, because the defendant, having been committed to prison and undergone his sentence, has satisfied the liability. The plaintiffs might have proceeded under s. 20 of the Friendly Societies Act, and if they had done so there would have been a debt, and the remedy by distress would have been available; but they have elected to proceed under s. 16, sub-s. 9. Where a statute provides a special remedy for the recovery of money, and the mode so pointed out is followed, an action will not afterwards lie to recover the same claim. The case is concluded by *Knight* v. *Whitmore* (1), which was not cited in the county court.

Hextall, for the plaintiffs, was called on. In *Knight* v. *Whitmore* (1) it was not pointed out that there was no power of distress, and the decision of the Divisional Court was final, for the plaintiff had no right of appeal, and therefore this Court is not bound by that case.

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moneys applied improperly, and in default of such delivery or repayment, or of the payment of such penalty and costs aforesaid, to be imprisoned, with or without hard labour, for any time not exceeding three months; but nothing herein contained prevents any such person from being proceeded against by way of indictment, if not previously convicted of the same offence under the provisions of this Act."

(1) 53 L. T. (N.S.) 233.

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POLLOCK, B. It is unnecessary for us to go into the merits of this case, because there is the decision of the Queen's Bench Division in *Knight* v. *Whitmore* (1); and, although I do not go so far as to say that in every case and under all circumstances the Court is absolutely bound by a decision of another Divisional Court, still, according to all the ordinary rules by which the practice of the Courts is regulated, the decision to which I have referred is one by which we should abide. It is urged that we need not follow that decision, because it was a case in which there was no right of appeal from the Divisional Court. That is a contention which cannot prevail; but, under the circumstances, we will give leave to appeal.

CHARLES, J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Warriner & Kinch, for Stone, Derby.*
Solicitor for defendant: *FitzPayne, for Briggs & Clifford, Derby.*

P. B. H.

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Feb. 5.

[IN THE COURT OF APPEAL.]

THE SOUTH STAFFORDSHIRE TRAMWAYS COMPANY, LIMITED *v.* THE SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED.

Insurance—Insurance in respect of Accident—Construction of Policy—Time, Computation of—Insurance "from" a date—"Any one Accident."

The plaintiffs, a tramcar company, effected with the defendants an insurance against "claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from November 24, 1887," to the amount of "250*l.* in respect of any one accident." On November 24, 1888, one of the plaintiffs' tramcars was overturned, forty persons were injured, and the plaintiffs became liable to pay claims to the amount of 833*l.* :—

Held, by the Queen's Bench Division, that the effect of "from" in the expression "for twelve calendar months from November 24, 1887," was to exclude November 24, 1887, and to include November 24, 1888, in the period of the insurance, and that the defendants were therefore liable:

Held, by the Court of Appeal, that "accident" in the policy meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to 250*l.*; but the plaintiffs were entitled to recover the amount of 833*l.* on the policy.

SPECIAL CASE, the facts of which were in substance as follows. The action was for £833 upon a policy of insurance. Prior to

(1) 53 L. T. (N.S.) 233.

November 16, 1887, the defendants agreed with the plaintiffs to insure them against the risks mentioned in the policy hereinafter referred to; and on November 16, 1887, the plaintiffs paid to the defendants 20*l.* on account of the premium, and the defendants issued to the plaintiffs a covering note dated November 15, 1887, whereby the defendants agreed to hold the plaintiffs covered against liability in damages to persons and property until the preparation of the association's vehicle policy, and under the terms and conditions of the association's policy. In due course, on November 24, 1887, a proposal was signed by the plaintiffs; and on December 2, 1887, a policy of insurance was issued.

The policy, after reciting that the plaintiffs, by a proposal dated November 24, 1887, had applied to the defendants "for an indemnity against all such claims as hereinafter mentioned for compensation for personal injuries, and damage to property, caused by vehicles in their possession," and had paid to the defendants the sum of 200*l.* "as the premium for such indemnity for twelve calendar months from November 24, 1887," witnessed that the defendants did thereby agree, that "so far as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles, or the motive power thereof while attached thereto, belonging to the assured and specified in the subjoined schedule, and for which accidents the assured shall be liable, the association shall pay to the assured the sum of 250*l.* in respect of any one accident, but not exceeding in all the sum of 1500*l.* in any one year, the number of vehicles in respect of which this insurance is granted not exceeding twenty."

The policy was expressed to be renewable and the premium was expressed to be due on November 24, but it was not renewed. The sum of 180*l.*, being the balance of the premium mentioned in the said policy, was paid to the defendants on or about December 23, 1887.

On November 24, 1888, one of the vehicles specified in the policy was overturned, and thereby caused injuries to about forty persons, and the plaintiffs became liable to pay compensation and expenses to the extent of 833*l.*

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The questions for the Court were, (1) whether the policy extended to and covered November 24, 1888; (2) whether the injury caused to each of the said persons constituted a separate accident within the meaning of the policy.

Moulton, Q.C., (with him, *Disturnal*), for the plaintiffs. The defendants are liable in respect of the full amount. The terms of the policy exclude November 24, 1887, and include November 24, 1888. An insurance for one day "from" a named date could not be construed except as excluding the named date. "Any one accident" means "any one accident to one person." The indemnity, therefore, extends to the claims of all the injured persons.

[He cited *Isaacs* v. *Royal Insurance Company.* (1)]

Hugo Young, for the defendants. The force of "from" in the date of a lease was considered by Lord Mansfield in *Pugh* v. *Duke of Leeds* (2); its force in the date of a patent by Parke, B., in *Russell* v. *Ledsam.* (3) According to these authorities, the effect of the preposition may be either inclusive or exclusive according to the context and the circumstances under which it is used. Here the intention of the parties almost must have been that the covering note should expire on November 23, 1887. Effect can only be given to this intention by interpreting the policy as including November 24, 1887, and excluding November 24, 1888.

The expression "any one accident" should in such an instrument be construed as used in the popular sense in which a railway collision is regarded as a single accident, though it may result in injuries to numerous persons. The defendants are, therefore, in any case, only liable in respect of the smaller sum.

Moulton, Q.C., in reply.

Cur. adv. vult.

Oct. 29. DAY, J. The first question raised is whether or not November 24, 1888, the day on which this event occurred, is included in the period covered by the policy. The insurance being

(1) Law Rep. 5 Ex. 296. (2) 2 Cowp. 714.
(3) 14 L. J. (Ex.) 353.

"for twelve calendar months from November 24, 1887," obviously either November 24, 1887, or November 24, 1888, must be excluded, for otherwise the period covered would exceed twelve calendar months by one day. I decide without hesitation that the former date is excluded and the latter included. If space were in question, and a mile had to be measured "from" a given place, it is obvious that no part of the place could be included in the mile. And, similarly, I cannot but think that, as regards time, "from" is akin to "after," and excludes the date fixed for the commencement of the computation. As was said in argument, had the words been, "for one day from November 24, 1887," it could not have been contended that November 24, 1887, was itself included. The defendants are, therefore, in my opinion, liable.

The second question is whether or not this event falls under the description of "one accident" in the policy. An accident is simply an event which happens apart from design, and this occurrence was such an event. It resulted in injuries to a large number of persons; but I think that it was none the less "one accident." It seems to me unnatural to regard the injury to each individual sufferer as a separate accident, for the purposes of such a clause of such a policy. The meaning of the clause is, I think, that, apart from any question of the number or amount of the claims made in consequence on the insured, as between them and their insurers, such an event as that which happened on November 24, 1888, is to be treated as "one accident." The defendants are, therefore, in my opinion, liable only as regards 250*l*.

LAWRANCE, J. As to the first question, I entirely agree with my learned brother. As to the second question, the meaning of "accident" in the phrase "any one accident," I regret to say that I differ from him. It is, I think, to be borne in mind that the object of the policy is to provide for the assured an indemnity against claims made upon them for injuries resulting from the negligence of their servants. This being so, I think it more appropriate to hold that the preceding word, "accidents," is used from the point of view of the several claimants upon the assured

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for injuries, each of whom claims in respect of a specific accident to himself, and not from that of the insurers, and that therefore "any one accident" means any accident to any one claimant upon the insured. "Any claim" would have been a less ambiguous expression. I think, therefore, that the defendants are liable in the full amount; but, as my learned brother is not of this opinion, I withdraw my judgment.

Judgment for the plaintiffs for 250*l.*

H. D. W.

The plaintiffs appealed.

Feb. 5. *Moulton, Q.C.*, and *Disturnal*, for the plaintiffs. The word "accident" may mean accident to the vehicle or accident to the person. A collision on a railway by which many persons are injured is, no doubt, spoken of as a railway accident; but each person injured would say that he had met with an accident in respect of his injury. The context must be looked at to see in which way the term is intended to be used. The insurance here is against claims for personal injury in respect of accidents caused by vehicles—that is, in other words, claims for injury to the person accidentally caused by vehicles. The accident is not spoken of as one which occurs to the vehicle, but one caused by it to the person. The expression, "any one accident," is clearly equivalent to "any one injury to a person accidentally caused by a vehicle."

Reid, Q.C., and *Eardley Wilmot*, for the defendants. "Any one accident" in its natural sense means any one occurrence. Thus, people speak of a "railway accident," or a "carriage accident." Having regard to the scope of the limitation of liability introduced by the words, they must be taken to have been intended to be used in that sense. No doubt in one sense it may be said that there were separate accidents to the forty persons injured. But the more natural and appropriate mode of expression, if the intention were to limit the liability as suggested for the plaintiffs, would have been to use some such words as "in respect of injury to any one person."

Moulton, Q.C., in reply.

LORD ESHER, M.R. I think the construction of the policy tolerably clear. The assurance is expressed to be "as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles." These were claims for personal injury, i.e., injury to the person, and each person injured claimed for injuries in respect of an accident to his person caused by a vehicle. If several persons were injured, I think, upon the true construction of this policy, there were several accidents. I agree with the view expressed by Lawrance, J. For these reasons I think that the plaintiffs are entitled to judgment for the larger amount, and therefore the appeal must be allowed.

BOWEN, L.J. I am of the same opinion. The word "accident" may be used in either of two ways. An accident may be spoken of as occurring to a person, or as occurring to a train, or vehicle, or bridge. In the latter case, though several persons were injured who were in the train, or vehicle, or on the bridge, it would be an accident to the train, or vehicle, or bridge. There might, however, be said to be several accidents to the several persons injured. To ascertain in which way the word "accident" is used, we must really look to the terms of the document. The policy recites a proposal made by the plaintiffs. The proposal is "for indemnity against all such claims as hereinafter mentioned for compensation for personal injuries and damage to property caused by vehicles in their possession." When we look to the policy, it limits the words of the proposal by adding the words "in respect of accidents." The question is, What is the meaning of those words? Is it meant by them to treat as one accident what happens to several persons? I should not think any one would suppose, having regard to the proposal, otherwise than that the word "accident" was there used in the sense of injury accidentally caused to the person. Then the question arises, What is the meaning of the term "one accident," further on in the policy? It seems to me that, if in the previous part of the policy the word "accident" is used as meaning accident to the person, it must receive the same construction in the phrase limiting the liability of the defendants. I think that Lawrance, J.,

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was right in thinking that "accident" meant in the policy the mischief suffered by a person injured to his person or property.

FRY, L.J. I am of the same opinion, and will add very few words. The operative part of the policy is an agreement by the defendants to insure "so far as regards claims for personal injury and damage to property made against the assured in respect of accidents caused by vehicles." It seems to me plain that "accidents caused by vehicles" there means "injuries accidentally caused by vehicles to person or property." I should come to that conclusion without reference to the terms of the proposal recited; but when that proposal is looked at the matter is still plainer. Then the policy proceeds to say that "the association shall pay to the assured the sum of 250*l.* in respect of any one accident." I think that the word "accident" is there used in the same sense as in the earlier part of the policy, and that the meaning is "in respect of any single injury to person or property accidentally caused."

Appeal allowed.

Solicitors for plaintiffs: *Smiles & Co., for Duignan & Elliott.*
Solicitor for defendants: *G. H. Hoyle, for H. A. Fitter.*

E. L.

Jan 28.

BUDD *v.* LUCAS.

Trade-mark—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 1 (*d*) *s.* 5, *sub-s.* 1 (*d*)—*Trade Description—Application of—Description in Invoice delivered along with Goods.*

The appellant ordered six barrels of beer of the respondent, a brewer. In pursuance of the order, the respondent's drayman delivered six casks of beer into the appellant's cellar, and at the same time left at the appellant's house an invoice in which the casks were described as "barrels." The term "barrel" in the beer trade means a cask containing thirty-six gallons. The invoice was not physically attached to any of the casks. Of the casks so delivered, one was of a considerably less capacity than thirty-six gallons. The appellant summoned the respondent under s. 2, sub-s. 1 (*d*), of the Merchandise Marks Act, 1887, for having applied a false trade description, namely, barrel, to a cask of beer false as to the measure and gauge thereof:—

Held, that the description of the cask in the invoice was not the less

applied to the cask within the meaning of the Act because the invoice was not physically attached to the cask.

CASE stated by justices.

The appellant, a licensed victualler, gave an order to the respondent, a brewer, for six barrels of beer. In pursuance of such order six casks of beer were delivered by the respondent's drayman into the appellant's cellar, and the drayman at the same time left at the appellant's house an invoice in the following terms: "The Brewery, Leamington, Jan. 16th, 1890. Mr. Budd, Coventry. Bought of Lucas, Blackwell, & Arkwright, brewers, 6 brls. XXX K. £14 : 8 : 0."

The term barrel, according to the usage of the beer-trade, means a cask of a capacity of thirty-six gallons. One of the six casks so delivered was of a capacity of not more than thirty-four gallons. The appellant summoned the respondent for that he did "unlawfully apply a certain false trade description, namely, barrel, to certain goods, to wit a certain cask of beer false as to the measure or gauge thereof, contrary to the provisions of the Merchandise Marks Act, 1887." (1) At the hearing before the justices it was contended, on behalf of the respondent, that the mere delivery of the invoice was not an application to the casks of the description of them which it contained within the meaning of the Act. Evidence was tendered by the appellant that on previous occasions the respondent's servants had delivered casks of beer of less than thirty-six gallons' capacity along with invoices in which they were similarly described as barrels. The justices refused to admit such evidence. The respondent gave evidence that he had no personal knowledge that the cask was deficient

(1) The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. (1), enacts that "every person who (*d*) applies any false trade description to goods shall . . . unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

By s. 3, sub-s. (1), "the expression 'trade description' means any description, statement, or other indication, direct or indirect, (*a*) as to the number quantity, measure, gauge, or weight of any goods."

By s. 5, sub-s. (1), "a person shall be deemed to apply . . . a trade description to goods who (*b*) applies it to any covering, label, reel, or other thing with which the goods are sold; or (*d*) uses a . . . trade description in any manner calculated to lead to the belief that the goods in connexion withwhich it is used are designated or described by that . . . trade description."

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in measure; and it was contended on his behalf that, assuming there was any guilty knowledge on the part of his servants, he was not criminally responsible for their misconduct. The justices being of opinion that the facts did not disclose an application of a false trade description within the meaning of the Act, dismissed the summons, subject to a case in which the following questions were submitted for the opinion of the Court:—

1. Whether the delivery of the invoice with the casks was an application of a false trade description within the meaning of the Merchandise Marks Act, 1887?

2. Whether they were right in excluding the evidence as to previous transactions between the parties?

3. Whether, assuming that the first question was answered in the affirmative, the respondent was criminally responsible for the acts of his servants?

Poland, Q.C. (*W. Graham*, with him), for the appellant. First, the delivery of the invoice was a sufficient application of the trade description which it contained to satisfy the statute. The application at which the statute aims is not confined to a physical application. The present case comes within s. 5, sub-s. 1 (*d*), the term barrel having been used in connexion with the cask sold. The words "in connexion with," in that sub-section, mean nothing more than "in relation to." Further, the case also comes within (*b*) of the same sub-section, for the invoice was a "thing with which the goods were sold."

Secondly, the evidence as to the previous transactions was wrongly rejected—such evidence is always admissible where a guilty knowledge is an ingredient in the offence: see the cases collected in *Reg.* v. *Francis.* (1)

With regard to the last question, it may be conceded that the respondent would not be criminally liable for any independent wrong-doing of his servants; as, for instance, if, the casks, being of a proper capacity, they neglected to fill them full: *Chisholm* v. *Doulton* (2); but here the master has supplied his servants with casks of deficient capacity.

(1) Law Rep. 2 C. C. 128. (2) 22 Q. B. D. 736.

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Channell, Q.C. (*A. Lyttleton*, with him), for the respondent. The Act aims only at the false marking of goods. A misrepresentation otherwise than by false marking is the subject only of an indictment for obtaining money by false pretences. The word "apply" was intended to refer only to a physical application. The title of the Act, which is "An Act to Consolidate and Amend the Law relating to Fraudulent Marks on Merchandise," points clearly to that conclusion. If the delivery of the invoice was a "use of a trade description" within s. 5, sub-s. 1 (*d*), then a mere verbal statement would equally come within that clause; but that could never be contended. Nor does this case come within clause (*b*) of that sub-section. The "thing with which the goods are sold" there was intended to refer to advertisements placed along with the goods inside an outer covering. Assuming the case to be within the Act, still the respondent is not liable in the absence of a personal intent to defraud. The offence consists not in selling beer in undersized casks, but in representing that the casks are full-sized. And if the respondent's servants so represented without his authority, he is not criminally liable for their misrepresentations.

Poland, Q.C., in reply.

POLLOCK, B. This case raises a question of very great importance as to the true construction of the Merchandise Marks Act, 1887. The facts are shortly these. A brewer sends to a customer by his carman a cask of beer, and the carman delivers along with the cask an invoice, in which the cask is described as a barrel. The cask was of a capacity of less than thirty-six gallons. And it was charged against the brewer that, as the term "barrel" in the beer trade means a cask holding thirty-six gallons, the delivery of the invoice was an application of a false trade description to the cask within the meaning of s. 2, sub-s. 1 (*d*).

The earlier Merchandise Marks Act, that of 1862 (25 & 26 Vict. c. 88), no doubt, dealt with trade-marks, and with nothing else. But the present Act is much wider in its scope; it deals with many things that are not trade-marks, or anything like them. For instance, s. 20 renders a person liable to a penalty who falsely represents that goods are made by a person holding a Royal

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Warrant. A representation may be within that section, although made by word of mouth. Again, in this Act is, for the first time, to be found the expression "trade description," which is treated as something distinguishable from trade-marks or other marks, and is defined to mean "any description, statement, or other indication, direct or indirect," as to the quality or quantity of goods. Then the definition of the term "apply" in s. 5 seems to suggest that it is not to be confined to a physical application; for it provides that a person shall be deemed to apply a trade description to goods who (inter alia) "uses" it "in any manner calculated to lead to the belief that the goods in connexion with which it is used are described by that trade description." No doubt, the description must be used in connexion with goods; but I think we should be cutting down the intention of the Act if we were to hold that the delivery of an invoice or other description of goods, at the time of, or immediately after, the delivery of the goods themselves, was not a use in connexion with the goods within the meaning of the section. Our answer to the first question submitted to us must, therefore, be that the delivery of the invoice with the cask may have been an application of a false trade description. Whether it was so or not depends upon certain questions of fact which it is for the justices to decide.

Upon the second question, the justices were clearly wrong. There can be no doubt that the evidence tendered was admissible upon the issue of the intent to defraud.

With regard to the last question, all we can say is that in our opinion there is nothing in the present Act to alter the general rule of law that a master is not criminally responsible for the unauthorized acts of his servants. There are, no doubt, certain Acts of Parliament, such as the Licensing Acts, which do introduce an exception in that respect into the general rule; but this is not one of those Acts.

CHARLES, J. I am of the same opinion. To the question whether the delivery of the invoice along with the casks was an application of a false trade description within the meaning of the Act, we cannot, in the present state of the case, give a categorical answer. All that we can say is, that it may have constituted the

offence with which the respondent is charged. No doubt there was not any physical application of a trade description to the goods; but I do not think that that is necessary. To my mind, it is clear from the language of s. 5, sub-s. 1 (*d*), that something more is contemplated than an actual physical connection. And if so, then I think that the delivery of the invoice with the goods might be a use of a false trade description of the goods delivered. With regard to the other questions, as to the admissibility of the evidence tendered, and the liability of the master for the acts of his servants, I agree with my brother Pollock. The case will be remitted to the justices with these expressions of opinion.

Case remitted to justices.

Solicitors for appellants: *Sharpe, Parker, Pritchard, & Sharpe, for Hughes & Masser, Coventry.*

Solicitors for respondent: *Cope & Co., for Wright & Hassall, Leamington.*

J. F. C.

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IN RE SOLTYKOFF. EX PARTE MARGRETT.

Bankruptcy—Petitioning Creditor's Debt—Bill of Exchange—Infant—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 22.

An infant cannot bind himself by the acceptance of a bill of exchange, even though the bill is given for the price of necessaries supplied to him during infancy.

APPEAL against the dismissal of a bankruptcy petition presented against Prince Alexis Soltykoff.

The petitioner was the indorsee of some bills of exchange which had been accepted by the Prince when he was an infant. There was evidence that the bills had been given in payment for goods supplied to the Prince by the drawer. It was assumed for the purpose of the argument that the goods were necessaries.

The registrar held that an infant could not make himself liable by accepting a bill of exchange, even though he accepted the bill in order to pay for necessaries supplied to him by the drawer.

The petitioner appealed.

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Bigham, Q.C., and *Henry Kisch*, for the appellant. No doubt the decided cases support the registrar's decision: *Williams* v. *Harrison* (1); *Trueman* v. *Hurst* (2); *Bartlett* v. *Emery* (3); *Williamson* v. *Watts* (4); *Stevens* v. *Jackson* (5); *Bateman* v. *Kingston* (6); but they are not decisions of a Court of Appeal, and are not binding on this Court.

Moreover, in *Williams* v. *Harrison* (1), it is said in the judgment of the Court, "the bill of exchange was drawn in course of trade, and not for any necessaries," which seems to imply that, if the bill had been for necessaries, the infant would have been bound by his acceptance of it.

In the present case the bills were given in payment for necessaries, and an infant can make himself liable for necessaries. The bills are in substance part of a contract for the supply of necessaries, and therefore the Infants' Relief Act, 1874, s. 1, does not apply. (7) Nor is s. 22 of the Bills of Exchange Act, 1882, a bar to the liability of an infant on a bill of exchange accepted by him in payment for necessaries; that section has no application to such a case.

Finlay, Q.C., and *Herbert Reed*, for the respondent, were not called upon.

(1) Carth. 160.
(2) 1 T. R. 40.
(3) 1 T. R. 42, n.
(4) 1 Camp. 552.
(5) 4 Camp. 164.
(6) 6 Law Rep. (Ir.) 328.

(7) The Infants' Relief Act provides by s. 1: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

The Bills of Exchange Act, 1882, provides by s. 22: (1.) "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract:

"Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2.) "Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

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LORD ESHER, M.R. The claim of the petitioning creditor is founded upon a debt alleged to be due to him as the indorsee of some bills of exchange accepted by the respondent, who at the time of the acceptance was an infant. The petitioner is not a person who supplied necessaries to the respondent when he was an infant. He supplied no necessaries to the infant; he is only the indorsee of some bills of exchange accepted by him. As regards an indorsee of a bill of exchange it is immaterial whether there was any consideration for the bills as between the drawer and the acceptor; he can sue the acceptor as the indorsee of the bills, and nothing else. The question, therefore, whether necessaries were supplied to the infant by the drawer of the bill, is immaterial.

It has been held in a long series of cases that an infant cannot make himself liable by the custom of merchants either by a bill of exchange or by a promissory note. It is said that those decisions are not binding on this Court. That may be so. But, in my opinion, it would be absolutely wrong at the present day to overrule those cases, which have been so long accepted as law. But I do not wish to rest my decision solely upon case law. The principle long established by English law is this—that an infant cannot make himself liable upon any contract whatever, except a contract for the supply of necessaries. I will go further and say this, that the principle of the cases goes to this extent, that, if an infant accepted a bill of exchange or gave a promissory note for the price of necessaries supplied to him, and he were sued upon the bill or the note by the man who had supplied the necessaries, and the plaintiff relied only on the bill or note, and gave no evidence of the supply of necessaries, the infant would not be liable. He is not liable upon a bill of exchange or a promissory note under any circumstances. It is not necessary for the protection of persons dealing with an infant that he should be liable on such a contract. The person who has supplied an infant with necessaries can always sue on that contract for the price of what he has supplied. Whether such a debt would support a bankruptcy petition I will not decide at present. The cases cited are against the appellant, and so is the established principle of English law. I think the Infants' Relief

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Act is also against him; it seems to me to assume that an infant is not liable upon a bill of exchange or a promissory note. I think this is a necessary implication from that Act, and also from the Bills of Exchange Act. In my opinion, the decision of the registrar was quite right.

BOWEN, L.J. I am entirely of the same opinion. The petition is founded on the contract created by the bills; not on the original contract for the supply of goods, even if that were a contract for the supply of necessaries. The Infants' Relief Act is clear that an infant cannot be made liable on such a contract, and the Bills of Exchange Act assumes the same thing.

LOPES, L.J. The petitioner is suing by virtue of the custom of merchants as indorsee of some bills of exchange. The question whether necessaries were supplied to the infant does not arise. But, even if the proceedings were between the original parties to the bills, the answer to the claim would be, that an infant cannot render himself liable upon a bill of exchange or a promissory note. This is no hardship upon a person who supplies necessaries to an infant, for he is entitled to sue the infant upon the original contract. All the authorities are in favour of this view of the law, and both the Infants' Relief Act and the Bills of Exchange Act point in the same direction.

Appeal dismissed.

Solicitors: *Smiles, Ollard, & Yates; Williams & James.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Nov. 18, 19; *Dec.* 19.

BARROW *v.* ISAACS & SON.

Landlord and Tenant — Lease — Breach of Covenants — Right of Re-entry — Covenant not to assign without Landlord's Consent — Mistake — Forgetfulness — Equitable Relief against Forfeiture.

In a lease for years the lessees covenanted not to underlet the premises, or any part thereof, without the consent in writing of the lessor, which consent the lessor agreed should not be arbitrarily withheld in the case of a respectable or responsible person, and power to re-enter was given to the lessor in case the lessees did not well and truly observe and perform their covenants. The lessees underlet part of the premises without obtaining or asking for the lessor's consent. The underlease was prepared by their solicitor, who omitted to look at the head lease, and forgot that it contained the covenant not to underlet without consent. Both the lessees and their under-lessees were respectable and responsible persons, and no injury was done, or likely to be done, to the lessor by reason of the underlease, nor could he have had any valid objection to it if his consent had been asked. In an action by the lessor to recover possession of the premises for breach of the covenant:—

Held, that the omission to ask the lessor's consent was not a mistake in respect of which the Court would grant the lessees equitable relief against forfeiture for breach of the covenant, and therefore that the plaintiff was entitled to succeed in the action.

Appeal from a decision of Day, J., giving judgment for the plaintiff in an action for the recovery of land.

The facts sufficiently appear in the head-note to this report, and they are fully stated in the judgments delivered by the Court of Appeal. (1) The arguments of counsel also sufficiently appear in the same judgments.

1890. Nov. 18, 19. *Pollard*, (*R. Isaacs*, with him), for the defendants.

Channell, Q.C. (*H. A. Forman*, with him), for the plaintiff.

[The following cases were cited in addition to those mentioned in the judgment of Kay, L.J. (1): *Sear* v. *House Property and Investment Society* (2); *Treloar* v. *Bigge* (3); *West* v. *Dobb* (4); *Hack* v. *Leonard* (5); *Wafer* v. *Mocato* (6); *Rose* v.

(1) Post, pp. 418, 422, 423.
(2) 16 Ch. D. 387.
(3) Law Rep. 9 Ex. 151.
(4) Law Rep. 5 Q. B. 460.
(5) 9 Mod. 91.
(6) 9 Mod. 112.

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Rose (1); *Eaton* v. *Lyon* (2); *Sanders* v. *Pope* (3); *Bracebridge* v. *Buckley* (4); *Bargent* v. *Thompson* (5); *Hughes* v. *Metropolitan Ry. Co.* (6); *Gregory* v. *Wilson* (7); *Reynolds* v. *Pitt* (8); *Green* v. *Bridges* (9); *Job* v. *Banister* (10); *Nokes* v. *Gibbon* (11); *Shearman* v. *McGregor* (12); *Townsend* v. *Crowdy* (13); *Peachy* v. *Duke of Somerset* (14); *Willmott* v. *Barber* (15); *Rogers* v. *Ingham.* (16)]

Cur. adv. vult.

1890. Dec. 19. LORD ESHER, M.R. In this case the plaintiff had let to the defendants valuable premises in the city of London, under a lease which contained a stipulation that the lessees should not underlet without the consent in writing of the plaintiff; and there was a right of re-entry for breach of any of the covenants in the lease. The plaintiff brings his action against the defendants claiming a right to re-enter under that stipulation. The defendants had underlet part of the demised premises. They had left the matter in the hands of their solicitor to prepare the underlease. The solicitor was at the moment away from his office—I believe out of London—and his clerk drew the underlease without looking at the superior lease, and he forgot the stipulation in the superior lease which required that the landlord's consent in writing was necessary to an underletting. That stipulation also provided, that although the consent of the landlord was necessary, he was not arbitrarily to refuse his consent. But, as the matter stood, his consent was never asked. It was argued by the defendants' counsel that the covenant not to underlet without the landlord's consent was a negative, not an affirmative covenant, and that therefore the stipulation for re-entry for breach of covenant did not apply. But I think that that proposition is disposed of because the word "observe" as well

(1) Amb. 331.
(2) 3 Ves. 689.
(3) 12 Ves. 282.
(4) 2 Price, 200.
(5) 9 Jur. 1192; 4 Giff. 473.
(6) 1 C. P. D. 120; 2 App. Cas. 439.
(7) 9 Hare, 683.
(8) 19 Ves. 134.
(9) 4 Sim. 96.
(10) 2 K. & J. 374.
(11) 3 Drew. 681.
(12) 11 Hare, 106.
(13) 8 C. B. (N.S.) 477.
(14) 2 W. & T., 3rd Ed. p. 979; 1 Str. 447.
(15) 15 Ch. D. 96.
(16) 3 Ch. D. 351.

as "perform" has been put in the stipulation, though I doubt whether it was necessary to put that word in. However, the stipulation for re-entry, as it stands, clearly applies to a negative as much as to an affirmative covenant. There was also a discussion as to what was the meaning of the stipulation that the superior landlord should not arbitrarily refuse his consent. I take that to mean that he should not wholly unreasonably refuse his consent. In the present case the defendants were people of the highest class in the city of London. The sub-letting by them was to a person of nearly equal position in the city of London. No alteration of any kind was made in the premises. There was, therefore, nothing to be considered—at least, by any reasonable man, one would think—but the position of the sub-tenants. Here was a superior landlord having people of the highest class in the city of London liable to him for the whole rent, and here was a person of the utmost respectability who would have been offered to him as the sub-tenant. It is impossible, to my mind, to conceive that any reasonable man in the city of London could have made any objection to the sub-tenant, and I am perfectly certain that, if this plaintiff had been asked to give his consent at the time, it never would have crossed his mind to object to the sub-tenant in this case, and that the objection which he has taken since he found out the slip which had been made is either an afterthought of his from anger because his consent was not asked, or, as I strongly suspect, from some other motive. As to its being a bonâ fide objection, I shall found my judgment upon this, which I take to be absolutely true, that he had no valid ground of objection; that he never would have objected; that no reasonable man could have objected; and that therefore, if he had been asked and had objected, his objection would have been wholly unreasonable, and therefore arbitrary. More than that, the omission to ask his leave under those circumstances has not had any possible effect whatever upon his rights, or upon what he would have done, or upon what he would not have done.

Nevertheless, it is obvious that there has been a breach of the covenant. His consent was not asked. There is a breach of the covenant, and upon a breach he has a right of re-entry. Therefore at law it is impossible to doubt that the plaintiff's right of

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re-entry was made out. He was entitled at law to recover against the defendants the possession of the premises—that is to say, to get rid of the lease, which was a long lease, and of great value to the defendants. Well, the plaintiff insists upon exercising that right. What motive he has for insisting upon it even now I cannot see exactly; there must be some motive, but I do not know what. Nevertheless, that is his right. Then came the only difficult question in the case. It being to my mind clear that the omission to ask the plaintiff's consent had no effect at all upon any real right of his, it being equally clear, to my mind, that not the least harm was done to him, because there is nothing to compensate and nothing to rectify in that respect, the question is whether equity would relieve against that which I consider worked a forfeiture of the lease. The difficulty has been to find out under what head of equity the relief sought could be brought. Equity, it is said, will relieve against fraud, accident, or mistake; and I think you must add that equity will only relieve where there can be complete compensation, or where there is no injury which requires any compensation. Under which head is this case brought? It is obvious that it is not fraud. That is not to be attributed to either of the parties. It is not accident, because it is the result of something which was done on behalf of one of the parties. Is it mistake? If it is mistake within the meaning of that phrase in the equitable doctrine, is it such a mistake as a Court of Equity would in this case relieve? Now, having thought over this matter, and looked into all the cases, I can find no definition of what "mistake" is; but if you treat mistake in its ordinary sense in the English language, is mere forgetfulness mistake? Can you, in English, say, "I forgot," and is that the same thing as saying, "I was mistaken"? I think not. Both those questions depend on something happening in the mind of the person, and you have to see what it is that happens in his mind. If he merely forgets, he does not assume that one state of things exists whereas some other state of things exists: it is a mere passive state of mind; he has forgotten—he has not thought that one thing was in existence, whereas something else was in existence. I should say that mere forgetfulness is not mistake at all in ordinary

language. I cannot find any decision in Courts of Equity which has ever stated that mere forgetfulness is mistake against which equity would relieve. On that ground I should myself come to the conclusion, although very unwillingly indeed in this case, that the Courts of Equity could not relieve. There is another suggestion, that, even although it be mistake, a Court of Equity will not relieve where that mistake is the result of the negligence of the person who has made the mistake. It was suggested, further, that a Court of Equity will not relieve where the mistake has been the result of the negligence of an agent of the person who is asking for relief. Now, to say that under such circumstances as those, where there has been no harm done, or only a harm which can be immediately compensated, the Court cannot relieve against the result of negligence either of the lessee or of his agent, would, to my mind, cripple the salutary equitable powers of the Courts. Here there was no negligence of the party affected. It cannot be suggested, and never has been suggested, that Sir Henry Isaacs was guilty of negligence. All that can be suggested is that he did what such a person would naturally do—leave the matter to his solicitor. But there was negligence by the lessee's agent in not looking at the superior lease. Is the negligence of an agent invariably to prevent a Court of Equity giving relief, assuming that that negligence has done no harm at all, or that it has done harm which can be immediately compensated? I should be very sorry to hold that as a fixed rule. Supposing that what was required was, not that consent to the underletting should be required and given, but that a notice only should be given; and supposing a man who has a valuable property, or a valuable lease, writes out the notice, gives it to an agent to deliver, whom he has every reason to suppose will do what is right, and that agent negligently omits to give the notice. If an action were brought against anyone for the negligence, there being no damage done, it could not be maintained. Nevertheless, it is suggested that equity could not relieve. I object to that proposition. I cannot find any case in equity which so decides, and I decline to think that it is a true proposition.

If, therefore, I had been alone in this case, I should notwith-

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standing the negligence, if there was a mistake, have relieved immediately. But, as I have said before, I do not think that this is a case of mistake; it is a case of mere forgetfulness, and as I come to the conclusion, after the best consideration that I can give to the matter, that mere forgetfulness is not mistake, then this proposed relief does not come under any head of equity which the Courts have ever administered. The plaintiff, therefore, is entitled to exercise the right of re-entry which the law has given him, and the defendants have no remedy.

For these reasons, I think that the plaintiff must have judgment, and that this appeal must be dismissed.

LOPES, L.J. The conclusion at which I have arrived is embodied in the judgment, which Kay, L.J., is about to deliver, in which judgment I entirely agree.

The following judgment was read by

KAY, L.J. The plaintiff is a lessor who has brought an action of ejectment upon a power of re-entry in the lease for breach of a covenant against assigning or underletting without consent.

The lease, dated August 12, 1881, was of a warehouse in the city to Sir Henry Isaacs and his brother, trading as Messrs. Isaacs & Son, and the power of re-entry is in case the lessees "do not well and truly observe and perform" their covenants. The covenant alleged to have been broken is "not to assign, underlet, or part with the possession of the premises, or any part thereof, without such consent as aforesaid, which consent the lessor hereby agrees shall not be arbitrarily withheld in the case of a respectable and responsible person." Such consent as aforesaid is expressed a few lines earlier in a preceding covenant thus: "without the license and consent in writing of the lessor, his executors, administrators, and assigns for that purpose first had and obtained." The grammatical construction, therefore, is, that the consent to assign must be first had and obtained, and I think the nature of the case would make this clear without the words, "first had and obtained." If it had simply been "shall not assign without the lessor's consent," that would, primâ facie, mean a consent obtained before the assignment. It seems that

the original lease was left by Messrs. Isaacs with their solicitor, Mr. Sydney, who kept it in a safe of which he had the key. Some years ago Messrs. Isaacs underlet part of the ground floor of the warehouse to a tenant named Francis, and on this occasion the plaintiff's consent was applied for and obtained. He went to Sydney's office and signed a written consent. Recently Messrs. Isaacs were desirous of underletting another portion of the premises to persons named Henderson and Liddell, and instructed Sydney to prepare a proper underlease. He being temporarily absent, the matter was conducted by his clerk, Gamble, who had not got the lease or any copy of it, and who prepared a fresh underlease from a copy of that to Francis, which did not, upon the face of it, notice the necessity of obtaining the plaintiff's consent. Gamble was ignorant of the necessity. Before the underlease was signed, however, Sydney returned, and the completion of the matter was managed by him. He made in his own writing certain alterations in the draft, and obtained the execution of the underlease. He had forgotten that the plaintiff's consent was necessary, and omitted to look at the lease to Messrs. Isaacs, which was in his safe; and accordingly the matter was concluded without the consent of the plaintiff being obtained or asked for. Mr. Sydney in his evidence said that it was usual in such a case to examine the original lease; but he supposed that Gamble had done all that was necessary. He added, with a frankness which was creditable to him, that no doubt the omission to look at the lease was great neglect. There was therefore, primâ facie, a breach of the covenant not to underlet without the plaintiff's consent. The plaintiff did not discover what had been done till October, 1889, when, passing along the street, he saw the names of Henderson & Liddell put up on the door. He communicated with Messrs. Isaacs without delay; and they, by letter dated October 30, 1889, applied for his consent to what they had done. This he refused by a letter of October 31, 1889. The plaintiff admits that Henderson & Liddell are respectable and responsible persons, and it has been argued that, this being so, his consent was not required. I do not agree with that argument. The terms of the covenant are quite clear. If the intended lessees are respectable

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and responsible persons the consent is not to be "arbitrarily withheld." Those words simply mean that the consent must be asked for before the assignment, and that it may be withheld, even though the intended lessees are proper persons, if such withholding is not arbitrary. Many cases may be supposed in which it would not be. Respectable and responsible persons might desire to carry on a trade which would be injurious to the plaintiff, or which would depreciate the property. The plaintiff might have valid reasons for objecting to an underlease of a portion only of the warehouse. The underlessees might wish to use it for some purpose not being a trade, which would altogether change the character of the premises, and many other reasons for objecting might be suggested. Another point made was that the proviso for re-entry refers only to the breach of affirmative and not of negative covenants. This is founded on certain obiter dicta in *Hyde* v. *Warden*. (1) Speaking for myself, I should think that an extremely narrow construction if the word "perform" only had been used. "Perform" has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting as well as by active proceedings. But where the words are "observe and perform," as here, there is no reasonable ground for confining those words to the breach of an affirmative covenant. Then if, as I think, there was a clear breach of the covenant, and a consequent right in the plaintiff to re-enter, is this a case in which equity would relieve against the forfeiture? The plaintiff has been called, and has not been able to shew that any actual damage has been done, or that he has any valid reason for objecting, if his consent had been duly asked. Messrs. Isaacs and Sydney have all deposed that at the time of granting this underlease they had forgotten—although they certainly once knew—that the plaintiff's consent was necessary. Gamble did not know this. It has been argued (1.) that this was a mistake which enables equity to relieve against the forfeiture; (2.) that it would be a proper exercise of that discretionary jurisdiction to do so in this case, as no damage has been done to the

(1) 3 Ex. D. 72.

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plaintiff by the underlease. I do not desire to cast the least doubt upon the jurisdiction of the Court to relieve in cases of what it calls mistake; what we have to determine is whether such relief would be a proper exercise of that jurisdiction in this case. Long ago Courts of Equity assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise, or mistake. On this principle it relieved against payment of the whole penalty on a money bond before the statutes 4 & 5 Anne, c. 16, ss. 12 and 13, and 8 & 9 Wm. 3, c. 11, which enabled Courts of Law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo. 2, c. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have been some hesitation whether this relief might not be extended to other cases of forfeiture for breach of covenants such as to repair, to insure, and the like, where compensation could be made; but it was soon recognised that there would be great difficulty in estimating the proper amount of compensation; and, since the decision of Lord Eldon in *Hill* v. *Barclay* (1), it has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise, or mistake. At present the only one of these we have to deal with is mistake; and the questions are, (1.) whether the facts I have described amount to mistake; and, if so, (2.) whether in its discretion the Court will relieve. Very wisely, as I presume to think, the Courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant—even if not negligent—can properly be called mistake. The case of *Kelly* v. *Solari* (2), however, and the observation of Lord Blackburn in the House of Lords in *Brownlie* v. *Campbell* (3) establish that, in

(1) 18 Ves. 56.
(2) 9 M. & W. 54.
(3) 5 App. Cas. 952.

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an action to recover money paid by mistake, it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on his part can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity. It is an entirely different question whether on the ground of such a mistake equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness. Vigilantibus, non dormientibus, leges subveniunt. Equity is bound to consider all the circumstances of each case. To a suitor asking to be relieved from forfeiture, the result of carelessness so gross that it might almost be called wilful, it can hardly be favourably disposed. I have spoken of the right of re-entry of a landlord as a "forfeiture" of the lease, but the use of the word "forfeiture" in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts then the landlord may re-enter. Lord Eldon in *Hill* v. *Barclay* (1), dealing with Lord Erskine's observations as to relieving against breach of covenant to repair, said: "A particular case might perhaps occur, such as are put by Lord Erskine in *Sanders* v. *Pope* (2), in which it would be demonstrable that the landlord would sustain no injury by the relief; but it is taking a prodigious liberty with a contract by which a tenant has undertaken forthwith to repair." I understand that to mean that it is a very strong proceeding for equity to interfere with the contract of the parties that the landlord may re-enter for breach of covenant, and that it can only do so in very exceptional circumstances. In *Earl Beauchamp* v. *Winn* (3)

(1) 18 Ves. 62. (2) 12 Ves. 282.

(3) Law Rep. 6 H. L. 223.

the Court of Chancery has refused to rescind an agreement which it was sought to set aside on the ground of mistake common to both parties. The mistake alleged on the part of the Earl was that he thought he had merely a right over the surface of a certain common, called East Common, instead of being owner of the soil, as he really was. This depended upon the doubtful construction of an ancient grant in 1799, which was among his title deeds, but which the Lord Chancellor was of opinion he was not guilty of any negligence in not having consulted. The Lord Chancellor said (p. 230): "This is not a case of mistake, therefore, but of ignorance; and ignorance resulting from a party's own omission to avail himself of information within his power." At p. 233 he says: "The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party." At p. 235 the Lord Chancellor adds that if the Earl had mistaken his right to the East Common, and that he was in law the owner of the soil, instead of having merely a right over the surface, there was jurisdiction in equity to set aside the agreement. The House came to the conclusion that there was not any mistake, and affirmed the decision. The Lord Chancellor's former words, as to the ignorance not being mistake, are probably a statement of the argument which had been addressed to the House rather than his own opinion. However, he carefully excepts the case of ignorance arising from negligence of the person who seeks relief. In the well-known case of *Duke of Beaufort* v. *Neeld* (1) an exchange was made of lands under the Inclosure Act, 6 & 7 Wm. 4, c. 115, s. 35 of which Act requires the consent in writing of the proprietor. The Duke of Beaufort signed a written consent. The commissioner directed the exchange, and Neeld entered upon the lands exchanged. The Duke sent a written notice to the commissioner declaring that his consent had been signed under a misapprehension. The Duke then brought an action of trespass and ejectment, in which judgment was given against him. He then filed a bill to rescind

(1) 12 Cl. & F. 248.

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the written consent. During the argument Lord Brougham said, "Equity has not relieved against gross improvidence." Lord Lyndhurst, L.C., in giving judgment, said that the duke stated that, when he signed the consent, he did not know that the piece of land in question was included in it, because it was mentioned, not by name, but by a number which referred to a map not then in his possession. But he says it was his duty to make inquiry, and, "if he did not choose to exercise due caution in that respect, he cannot turn round and say, 'I really did not know the contents of the paper when I signed it; I signed it incautiously.' He cannot now with propriety say that so as to free himself from the consequences of his own act." Lord Brougham said: "He need not look if he does not choose; but then, if he does not look, he must bear the penalty of being held to have looked, and if he either shuts his eyes or carelessly sees, he shall not be allowed in a Court of Law or Equity to say, 'It is a mistake; I never knew it,' because he might have known it, and he ought to have known it, and if he signs his name, and could have looked, and did not look, still he is bound by his act." Lord Campbell, in the same case, said: "But then we come to the consent which was signed by the duke's own hand, and at that time I believe what the duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honour, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power, and it being his duty to have ascertained the fact, can he be heard to say, 'I was ignorant; relieve me from the effects of the mistake which I have made'?" The equitable relief sought in that case was refused partly on this ground. It is a decision of the highest tribunal that equity will not relieve when the mistake arises from the negligence of the suitor who seeks its help.

I am clearly of opinion that Messrs. Isaacs must be held responsible for any negligence of Mr. Sydney. Their plea for relief therefrom, explicity stated, would run thus: "We admit that we were aware of the necessity of obtaining the plaintiff's consent before making the underlease. The lease to us which

imposed that obligation was in our possession. We had forgotten the provisions of it. The ordinary course of business required that we should examine the lease before granting the underlease. We admit that we neglected to do so, but we say that no harm has been done to the plaintiff, and therefore equity should relieve against the forfeiture." There must have been thousands of cases in which leases have been forfeited owing to non-performance of covenants through bonâ fide forgetfulness. Counsel have not cited to us, nor have I been able to find, a single instance in which relief has been given under such circumstances. It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore. Many suits would be instituted for relief upon this ground, which, until now, is unknown in the records of the Court as one upon which relief would be granted. The course of legislation upon this subject of forfeiture of leases by breach of contract is most significant. At first, as I have pointed out, the remedial jurisdiction of equity against penalties was extended to Courts of Common Law. Next, the relief it gave in cases of forfeiture for non-payment of rent was limited in time. Then ensued a long period in which equity seems to have refused relief in cases of breach of any of the other covenants in a lease. Very hard cases occurred, in which unconscionable landlords insisted on their legal rights. Especially hard were these forfeitures for breach of the covenant to insure when no damage had ensued. By 22 & 23 Vict. c. 35, ss. 4–9—extended to Courts of Common Law by 23 & 24 Vict. c. 126—it was enacted that "a Court of Equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot, at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit." The terms of that enactment, making it lawful to give this relief when the breach has been committed "through

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accident or mistake, or otherwise without fraud or gross negligence," shew plainly that equity had not been accustomed to relieve in such cases on the ground of accident or mistake; and, further, they provide that relief shall not be given, even in cases of accident or mistake, when there has been gross negligence. Now, by the Conveyancing Act, 1881, these enactments are repealed; but a locus penitentiæ is given to the lessee by requiring, in case of any breach of covenant, that the lessor shall serve upon him a notice specifying the breach and requiring him to remedy it, and to make compensation in money, before exercising his right of re-entry; otherwise the High Court may grant relief upon proper terms. But it is expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession or disposing of the land leased. Forfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of Courts of Equity.

Upon the whole, therefore, assuming, what I do not think it necessary to affirm or deny, that the High Court had jurisdiction to relieve in this case if in its discretion it thought fit to do so, for the reasons I have given I am of opinion that to grant such relief would not be a proper exercise of that discretion; and accordingly I think that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *W. A. Colyer.*

Solicitor for defendants: *A. E. Sydney.*

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LEAROYD AND ANOTHER *v.* BROOK. 1891 *Jan.* 28.

Apprentice—Apprenticeship Deed—Refusal of Master to keep, teach, and maintain Apprentice—Independent Covenants—Condition Precedent.

To an action for a breach of a covenant in an apprenticeship deed by the master to keep, teach, and maintain his apprentice, it is a good defence that the apprentice, while in his master's service, was an habitual thief.

ACTION tried before A. L. Smith, J., without a jury. The facts and arguments are set out at length in the judgment.

Waugh, for plaintiffs.

Tindal Atkinson, Q.C., and *Herbert Manisty*, for defendant.

1891. Jan. 28. A. L. SMITH, J. This is an action brought by the guardians of Arthur Pickard, a lad of about sixteen years of age, to recover from the defendant damages, or in the alternative the whole or part of the sum of 100*l.*, being the premium paid by the plaintiffs upon apprenticing Pickard to the defendant, by reason, as it is alleged, of breach of the articles of apprenticeship by the defendant, he having refused to keep, teach, and maintain Pickard after December 31, 1888.

By deed bearing date December 23, 1887, and made between the plaintiffs of the one part, and the defendant of the other part, Pickard was bound apprentice to the defendant for a term of five years and three months, during which term Pickard was bound, among other things, to order and behave himself as a true and faithful apprentice, and not to waste his master's goods; and in consideration of Pickard having so put and bound himself, and also in consideration of the sum of 100*l.* then paid to the defendant by the plaintiffs, the defendant covenanted and agreed with the plaintiffs to teach the said Pickard the trade of a pawnbroker, to board and lodge him during the said term, and during the last two years thereof to pay him the weekly wage of 3*s.* The defendant was a pawnbroker and silversmith in a large way of business at Halifax, in conjunction with which he carried on an extensive trade in jewellery. He had two places of business in the town, having at the Charlotte Road premises, the lesser

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business of the two and where Pickard was located, as much as from 300*l.* to 400*l.* worth of jewellery pledged with him daily, together with other articles of value. If Pickard had continued apprentice, he would have graduated up to the larger business, at which jewellery to the amount of from 2000*l.* to 3000*l.* was constantly dealt in. By uncontradicted evidence it was established that, from the time when Pickard entered upon his duties as apprentice—that is, from December, 1887—his conduct was bad. Young as he was, he frequented singing-rooms and theatres, smoked cigars, and stayed out till late hours of the night, the defendant having repeatedly threatened to lock him out if he would not mend his ways; he, however, persisted in his conduct, in spite of the efforts of the defendant. For some months prior to December, 1888, the defendant's money had been repeatedly missed from the till at Charlotte Road, and upon the afternoon of December 31, 1888, Pickard was detected, he having then stolen 6*d.* out of it. On being found out and challenged as to how much more he had taken, he said that he did not know, but that he had been taking it for months, sometimes as much as 5*s.* at a time. Sums amounting in all to about 5*l.* had during these months been missed from the till. The defendant thereupon had an interview with the plaintiffs, and informed them of what had happened; they asked the defendant to take Pickard back, and he said he would take time to consider; this he did, and on the next day informed the plaintiffs that, as he could have no confidence in Pickard, he could not further keep him, and sent him back to the plaintiffs. This action was then brought. That Pickard was an habitual thief—that is, that he had been in the habit of stealing—in my judgment has been proved.

The question now arises, Is a master under articles of apprenticeship bound to keep, teach, and maintain at his own risk an habitual thief for the term stipulated for by the articles? I should certainly answer off-hand the question in the negative; but it was said that I was bound by authority to hold otherwise. It was said on behalf of the plaintiffs that, inasmuch as the defendant's covenant in the deed of apprenticeship to keep, teach, and maintain the apprentice, was independent of the obligations

imposed upon the apprentice, therefore the breach of the obligations by the apprentice afforded no answer to a breach of covenant by the master to keep, teach, and maintain for the stipulated period.

It has unquestionably been held that, in an ordinary apprenticeship deed, the covenants by the master are independent covenants, the performance of which does not depend upon the performance by the apprentice on his part of the obligations imposed upon him by the deed. The cases of *Winstone* v. *Linn* (1) and *Phillips* v. *Clift* (2) are direct authorities upon this point. It appears, however, to me that this does not decide what I have to determine in the present case. Where an apprentice by his own wilful act prevents a master from teaching him, the master can set this up as a defence when sued upon his covenant to keep, teach, and maintain the apprentice, irrespective of the question whether the apprentice has performed his obligations under the deed or not. This is settled by the case of *Raymond* v. *Minton* (3). The ratio decidendi of that case is not that the master is absolved because the apprentice has not performed the obligations imposed upon him by the articles, but because the apprentice by his own acts has put it out of the power of the master to carry out what he had contracted to do. Apply this reasoning to the present case. The master has contracted to teach the apprentice how to carry on a pawnbroker's trade honestly. That must be the contract by the master. The apprentice, by becoming an habitual thief, has rendered that impossible. Then why does not the principle laid down in *Raymond* v. *Minton* (3) apply? Moreover, the remedy suggested in some of the cases as being the sole one which the master had upon default of the apprentice and loss consequent thereon, namely, to sue for the loss, can hardly exist in a case where the apprentice becomes an habitual thief; he cannot sue at once for his loss, but must first prosecute his apprentice, get him convicted and sentenced if he can, then take him back for the residue of the term, and sue for the loss he has sustained—an inapt procedure, beyond all question.

(1) 1 B. & C. 460. (2) 4 H. & N. 168.
(3) Law Rep. 1 Ex. 244.

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A very similar point to that now under discussion was attempted to be raised in the case of *Phillips* v. *Clift* (1). The plea in that case alleged "that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service, wherefore the defendant dismissed him." The case was argued upon demurrer, and the Court held the plea to be bad. The Lord Chief Baron held that the plea did not allege a felonious taking, and he went on to say: "I do not think it necessary to express any opinion as to what would be the effect of an allegation in the plea that the apprentice had been guilty of a felonious stealing, or had been actually convicted and suffered punishment, for the plea alleged neither the one nor the other." Baron Watson said: "I do not know what the plea means. The apprentice may have taken sweetmeats from a jar, or a shilling from the till, for which offences he might be corrected by personal chastisement or kept in confinement; but the master has no right to dissolve the contract." I will add, a very different taking from what has been proved in this case. Baron Channell rested his judgment upon the ground that the covenants were independent. This certainly is not an authority shewing that a master cannot justify upon the ground of his apprentice having become an habitual thief.

Two years later, viz. in 1861, Byles, J., at nisi prius, in the case of *Cox* v. *Mathews* (2), expressly held, in an action by an apprentice against his master for not teaching him, that, "if the plaintiff was in the habit of stealing, the defendant would not be bound to have him in his shop to instruct him, as there was gold lying about, and constant opportunities of stealing." This ruling is in point. No authority has been cited, and I am not aware of one, either overruling or even doubting this ruling of Byles, J. It is a ruling which commends itself to me. I follow it; and for the reasons above I hold that the defendant in this case has successfully justified the breach of covenant alleged against him. This being so, the claim for damages fails.

But it was further argued that, even if the defendant was justified in acting as he did, yet he must return so much of the

(1) 4 H. & N. 168. (2) 2 F. & F. 397.

premium as was not exhausted by keeping, teaching, and maintaining the apprentice. There has been no total failure of consideration, and there is no action for damages maintainable. Then how can the proportionate part of the premium be recovered? It cannot. Moreover, the case of *Whincup* v. *Hughes* (1) shews that this is so. I will point out that in this deed the covenants by the master are made not only in consideration of the payment of the premium, but also in consideration of the apprentice having bound himself to the defendant. This is different from the deeds which I find set out in the cases; for in them the covenants by the master are in consideration only of the payment of the premium. I only allude to the fact to point it out; I do not found my judgment in any way upon it; but I take it for the purposes of this case that the deed is an ordinary apprenticeship deed, with independent covenants, and I give judgment for the defendant with costs.

Judgment for defendant.

Solicitor for plaintiffs: *Boocock, Halifax.*

Solicitors for defendant: *Jubb, Booth, & Helliwell, Halifax.*

W. J. B.

[IN THE COURT OF APPEAL.]

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NATIONAL BANK *v.* SILKE.

Cheque—Words prohibiting Transfer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 73, 76.

By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8, when a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

The defendant drew a cheque, payable to the order of M., for 450*l.*, and crossed it "Account of M., National Bank," and gave it to M., who indorsed it to the National Bank, the plaintiffs:—

Held (affirming the judgment of Day, J.), that the plaintiffs were entitled to recover upon the cheque, for it contained no words prohibiting transfer, or indicating an intention that it should not be transferred:—

Semble, that a bill expressed to be payable to order cannot be made not

(1) Law Rep. 6 C. P. 78.

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transferable under s. 8; but, assuming that it can, the intention to prohibit transfer must be more clearly expressed than in the present case.

Semble, a cheque payable to order or to bearer cannot be made not negotiable except by crossing it in manner provided by s. 76.

ACTION by the plaintiffs, as holders of a cheque for 450*l.*, payable to order, drawn by the defendant, and indorsed to the plaintiffs.

At the trial before Day, J., without a jury, it appeared that on April 29, 1889, the defendant drew on the Camden Town branch of the Alliance Bank a cheque for 450*l.*, which he handed to J. F. Moriarty. The cheque ran, "Pay to the order of J. F. Moriarty, Esq., four hundred and fifty pounds," and was crossed by the drawer, "Account of J. F. Moriarty, Esq., National Bank, Dublin." Moriarty indorsed the cheque, and sent it to the plaintiffs, the National Bank, at Dublin, in a letter, directing them to credit his account with that sum. His account was then slightly overdrawn. The plaintiffs wrote acknowledging the receipt of the cheque "for your credit." The cheque arrived in Dublin on the 30th, and the amount was at once placed to Moriarty's credit, which made a balance of about 443*l.* to his credit.

On the same day the plaintiffs sent the cheque to London for collection. It was presented at the Camden Town branch on May 2, and was dishonoured, the defendant having given directions to the bank not to pay it, on the ground that it had been obtained from him by false representations. In the meantime cheques of Moriarty had been paid by the National Bank, which reduced his balance to 46*l.* 19*s.*

On May 4 the manager of the plaintiffs' bank wrote to Moriarty: "Please note that cheque 450*l.*, drawn by J. Silke, has been returned to us unpaid, with answer, 'Orders not to pay. Please send us a remittance to take it up.'" On the 10th the cheque was again presented at the Alliance Bank, and again returned. The plaintiffs, after some correspondence with the defendant, commenced this action.

The learned judge gave judgment for the plaintiffs. The defendant appealed.

Crump, Q.C., T. Willes Chitty, and *Ernest Pollock,* for the defendant. The direction to carry the amount of the cheque to Moriarty's account prevents it from being negotiable. Under the Bills of Exchange Act, 1882, s. 8, a bill is not negotiable if it contains words prohibiting transfer. Here the direction to pay to the account of Moriarty, at the National Bank, prohibits payment in any other way. Moriarty, therefore, could not transfer the cheque, and could not make the plaintiffs holders, so as to entitle them to sue upon it. The decision below gives no effect to s. 8 (1).

[LINDLEY, L.J. Does this section apply to cheques?]

Section 73 shews that it does. A cheque is a bill of exchange, payable on demand, and there is nothing in s. 8 to exclude from it bills payable on demand. In *Bellamy* v. *Marjoribanks* (2) nothing turned on the words, "for account of the Accountant-General." The case went only on the effect of crossing, which has been entirely altered by statute. But suppose the cheque could be negotiated to the bank, it was not in fact negotiated. When a cheque is sent by a customer to his bankers, he does not ask them to discount it. He intends them to receive the amount and place it to his credit.

[BOWEN, L.J. How do you distinguish this case from *Maclean* v. *Clydesdale Banking Co.* (3)?]

There the cheque was to be applied in reduction of an overdrawn balance—there was a special contract. Here the bankers never understood that they were discounting the cheque so as to make it their own. If they had, they would not have applied to Moriarty to take it up when dishonoured.

[BOWEN, L.J. Is it not to be inferred from the facts that the bankers were intended to have such rights as would protect them in respect of the advances they made on the credit of the cheque?]

No holder of a negotiable security applies to the person from whom he received it; he applies to the person liable to pay.

(1) By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8: "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable."

(2) 7 Ex. 389.

(3) 9 App. Cas. 95.

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Woolf, Q.C., and *Boydell Houghton*, for the plaintiffs, were not called on.

LINDLEY, L.J. The defendant was a customer of the Alliance Bank in London, and drew upon that bank a cheque payable to the order of Moriarty. It was crossed by the defendant with these words: "Account of J. F. Moriarty, Esq., National Bank, Dublin." Moriarty indorsed this cheque and sent it to the plaintiffs, the National Bank at Dublin. The plaintiffs sent it to London for collection, and it was dishonoured. In the meantime the amount had been carried to Moriarty's credit in his account with the plaintiffs, and drawn upon by him. When the cheque was returned to the plaintiffs dishonoured, they wrote to Moriarty for funds to take it up, and, as he failed to provide them, they commenced the present action against the defendant, and have recovered judgment. From that judgment the defendant has appealed.

The defendant first contends that by virtue of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8, the plaintiffs cannot sue upon this cheque, and that nobody but Moriarty could acquire any right to sue upon it. I am not satisfied that under that Act a cheque payable to bearer or to order can be made not negotiable except under the provisions in ss. 76–82, as to crossed cheques. We need not now decide that point; for, assuming that it can, it is necessary in my opinion that very plain words to that effect should be used. It is most important that a cheque should not be an embarrassing document. I am not satisfied that any words other than the words "not negotiable," which are prescribed by the Act, will be sufficient to make such a cheque not negotiable. I will, however, assume without deciding, that s. 73 makes s. 8 applicable to cheques. Sect. 8, sub-s. 1, enacts that "when a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable." Then sub-s. 4 says: "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not

be transferable." I will assume for the purposes of this case that under those provisions you can draw a bill expressed to be payable to order or to bearer, and yet make it not transferable; though I am disposed to think that you cannot. But if you can, there must be plain words prohibiting transfer or shewing an intention that the bill shall not be transferable. Ambiguous words will not do. Now do the words in the present case prohibit transfer of the cheque, or indicate an intention that it shall not be transferable. It cannot be contended that they prohibit transfer, and I do not think that they indicate an intention that the cheque should not be transferable. They amount to nothing more than a direction to the plaintiffs to carry the amount of the cheque to Moriarty's account when they have received it.

There only remains the question whether the plaintiffs are holders of the cheque in due course and for value The cheque was sent to them that they might carry it to Moriarty's credit, so that he might draw upon it, which he did; and I cannot say that they held it merely as agents to collect the amount for him.

BOWEN, L.J. I am of the same opinion, and shall only add a few words on the second point, whether the plaintiffs are holders of the cheque in due course for value. The case of *Maclean* v. *Clydesdale Banking Co.* (1), makes that clear which to a mercantile man would have appeared clear without any decision—that if a cheque is paid to a bank on the footing that the amount may at once be drawn upon, and it is drawn upon accordingly, the bank is a holder for value in due course.

FRY, L.J. On the second point, I shall add nothing. As regards the first point, I am inclined to think that s. 8 divides bills into three classes—bills not negotiable, bills payable to order, and bills payable to bearer; so that a bill payable to order must always be negotiable. But assuming that a bill payable to order can be made not negotiable under s. 8, sub-s. 1, I am clearly of opinion that the words used in the present case neither prohibit transfer nor indicate an intention that the

(1) 9 App. Cas. 95.

C. A. 1890

NATIONAL BANK v. SILKE.

cheque should not be transferable. Much more definite words must be used to counteract the effect of the cheque being expressed to be payable to order.

Appeal dismissed.

Solicitors for appellants: *Norris, Allen, & Chapman.*

Solicitors for respondent: *Tatham & Lousada.*

H. C. J.

C. A. 1891 *Feb.* 7.

[IN THE COURT OF APPEAL.]

OVERSEERS OF PUTNEY *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Poor-rate—Land taken by Promoters—Deficiency in Assessment—Liability of Promoters to make good Deficiency—Land Vacant when taken—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133.

By the Lands Clauses Consolidation Act, 1845, s. 133: "If the promoters of the undertaking become possessed, by virtue of this or of the special Act, or any Act incorporated therewith, of any lands charged with the land tax or liable to be assessed to the poor-rate, they shall be liable to make good the deficiencies in the several assessments for land tax or poor-rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the special Act."

The promoters of a railway company purchased houses beyond the limits of deviation from the line of the railway, in order to obtain the withdrawal of the opposition of the owners of such houses to the passing of the special Act. Some of the houses were unoccupied when acquired by the promoters. On a special case stated to ascertain the liability of the promoters in respect of the deficiency in poor-rates:—

Held (affirming the decision of the Queen's Bench Division), that, as the promoters could only hold land under the powers given them by statute, they could not be heard to say that they had become possessed of the houses otherwise than by virtue of their Acts, and that they were, consequently, liable to make good the deficiency:

Held, also, that as the statute directed that the deficiency should be computed according to the rental at which the houses were valued or rated at the time of the passing of the special Act, the fact that some of them were then unoccupied was immaterial in estimating the amount of the deficiency.

APPEAL from a decision of the Queen's Bench Division. (1)

The facts stated shortly were that the company, as promoters of a new line of railway, had purchased land on which there were houses, such land being situated beyond the authorized limits of

(1) Ante, p. 182.

deviation of the line. The object of the purchase was not to use the land for the construction of the line, but to buy off the opposition of the owners to the passing of the special Act authorizing the making of the line. Some of the houses were uninhabited when purchased by the company. The parish treated the whole of the land as if it had been acquired by the company by virtue of the special Act, and called on them under s. 133 of the Lands Clauses Act, 1845, to make good the deficiency in poor-rates in respect of all the houses, whether such houses, at the time of the passing of the special act, were occupied or not. The Queen's Bench Division gave judgment in favour of the parish.

The company appealed.

Page, (with him, *Balfour Brown, Q.C.*), in support of the appeal. This property does not come within s. 133 of the Lands Clauses Consolidation Act, 1845, for the promoters did not become possessed of it by virtue of that Act or the special Act, and the lands have not been taken or used for the purposes of the works. What the position of the company is with respect to these lands may be a question between them and the persons with whom they have dealt in respect of them; but, as regards the parish, the company are owners independently of statute, and must be treated in the matter of rating like any ordinary owner. Even if they are to be treated as holding by virtue of their Acts, they are not liable in respect of unoccupied houses. The parish would not have received any rate in respect of houses so situated, and therefore no deficiency has arisen which ought to be made good. This is in accordance with *Stratton* v. *Metropolitan Board of Works* (1), where it was decided that, as no rates were paid, at the passing of the Act, in respect of property occupied for public purposes, the promoters were not liable in respect of that land while it was in their hands and unremunerative.

Jelf, Q.C., and *Dryden*, contrà, were not called on.

LORD ESHER, M.R. As to the first point, I really can have no doubt. The company have no right to buy property or to hold it except for the purposes of their undertaking. They have

(1) Law Rep. 10 C. P. 76.

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OVERSEERS OF PUTNEY v. LONDON AND SOUTH WESTERN RAILWAY CO.

Lord Esher, M.R.

been assessed upon the footing that they have acquired certain land under their Acts of Parliament, and they claim that this, as a matter of fact, is not so, and that because it is not so, they are exempt from being assessed. I think they cannot be heard as against the parish, to say this, and that, as between the company and the parish, it must be taken that these lands were acquired by the company under their Acts—the only way in which the land could properly be taken.

On the other point the question is, What is the true construction of the section under which the parish claims that the deficiency shall be made good? That deficiency is to be computed according to the rental at which the lands were valued or rated at the time of the passing of the special Act. The assessments to be compared are that which existed, at the time of the passing of the Act, in respect of the lands taken, and the subsequent assessments of the same lands. What the company have to pay is the deficiency in the poor-rate from time to time, which is the result of the difference in these assessments—that is to say, suppose the assessment were 3000*l.* at the time of the passing of the Act, and subsequently in any year it amounted only to 2000*l.*, yet the rate is to be taken as against the company on the former sum, and by that means they make good the deficiency. That, I take it, is the judgment of the Divisional Court, which, in my opinion, was right on both points, and must be affirmed.

BOWEN, L.J. I am of the same opinion. The company are asked to pay on the footing that they have taken land for the purposes of their works, and they come into court and say that though they are possessed of the land, this is not by virtue of their statutory powers. The company are a statutory corporation, and not a corporation at common law. They have no powers except what their Acts give them, and they may not lawfully do anything that their Acts do not expressly or by implication permit them to do. That has been laid down in *Ashbury Co.* v. *Riche* (1), and *Wenlock* v. *River Dee Co.* (2); and the company could be restrained, at the instance of the Attorney General, from doing that which, to escape the tax, this company say they

(1) Law Rep. 7 H. L. 653. (2) 10 App. Cas. 354.

have done. They come immediately under the rule that no one is allowed in a court of justice, in order to escape from liability, to put forward a plea that that which he is doing is illegal. It is quite clear, therefore, that though there may not be any question of estoppel between parties, it would be against the policy of the law to allow the company to set up this answer to the claim which we are considering. As regards the other point —assuming the railway company to be liable—they next say that the sum which they are asked to pay ought to be diminished on the ground that some of the houses when they took them over were unoccupied, and were not paying any tax. Reference to the words of the Act of Parliament will shew that when the deficiency has to be computed it is not to be arrived at by taking the existing assessment and the payment formerly made; but it is to be computed according to the rental at which the lands were valued or rated at the time of the passing of the special Act. It is not a question of what was paid, but a question of what was assessed. On the one side is the rateable value at the time when it is sought to ascertain the deficiency, on the other, the rental at which the land was valued or rated at the time of the passing of the special Act, and a comparison between these supplies the measure of the deficiency in the rate which the parish can claim from the promoters. If the case of *Stratton* v. *Metropolitan Board of Works* (1) says anything different to this, I cannot think that, on that point, it was rightly decided; but I think an interpretation can easily be placed on the language used in that case to prevent our being driven to the supposition that it was intended that, should the houses happen to be unoccupied during the last part of the last rate before the company took them, thereupon the company are to escape all liability under this section in respect of these houses. The truth is, the scheme of this section is to create a parochial indemnity.

FRY, L.J. I agree.

Appeal dismissed.

Solicitor for the plaintiffs: *W. Reeve.*

Solicitors for the defendants: *Bircham & Co.*

(1) Law Rep. 10 C. P. 76.

A. M.

C. A.
1891
Feb. 2, 3, 4.

[IN THE COURT OF APPEAL.]

ALLCOCK *v.* HALL.

*Practice—Motion for New Trial—Jurisdiction of Court of Appeal—Power to enter Judgment—*53 & 54 *Vict. c.* 44, *s.* 1—*Order* LVIII., *r.* 4.

The Court of Appeal has jurisdiction on a motion for a new trial under the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), to direct judgment to be entered for either of the parties, instead of ordering a new trial.

MOTION by the defendants under the Supreme Court of Judicature Act, 1890, asking that part of the finding of the jury at the trial might be set aside and a new trial had, on the ground that the finding complained of was perverse and against evidence.

The action was brought by the trustees of a chapel called Bethel Chapel, in Nottingham, against the defendants, who were timber merchants, occupying a timber-yard immediately adjoining the chapel, claiming an injunction to restrain them from continuing a trespass on the plaintiffs' property by means of some pieces of wood, called "putlogs," which had been inserted into the wall of the chapel, and from placing planks of timber so as to lean against the wall and the putlogs. The plaintiffs also claimed 100*l.* damages. The defendants pleaded that by reason of continuous user of the putlogs for more than thirty years they had acquired a right under the Prescription Act (2 & 3 Wm. 4, c. 71).

The action was tried before Hawkins, J., and a special jury at Nottingham. The evidence was conflicting; and the jury found a special verdict, finding, on the main issue between the parties, that the wall had been used for more than thirty years for the purpose of rearing the planks up, but that no putlogs were inserted there previous to 1878. This was the finding complained of. The learned judge reserved judgment.

Dugdale, Q.C., and *H. Y. Stanger*, for the defendants, contended that the finding of the jury was entirely against the weight of the evidence. In case the Court should be in their

favour, they asked that judgment might be at once entered for the defendants without the delay and expense of a new trial.

Buszard, Q.C., and *J. H. Etherington Smith*, for the plaintiffs.

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ALLCOCK v. HALL.

Cur. adv. vult.

1891. Feb. 4. LINDLEY, L.J., after referring shortly to the facts of the case, said: The impression on the minds of myself and my colleagues is that the verdict was unquestionably wrong. I think the jury misapprehended the nature of the evidence. I have also consulted Hawkins, J., because it is extremely difficult for the Court of Appeal to deal with evidence which comes before them only in writing. The demeanour of the witnesses and other matters are very material in estimating the value of evidence. The learned judge says that his opinion is, and always has been, that the verdict was utterly wrong. Under these circumstances, the question is, What ought the Court of Appeal to do? The Court is always very cautious about setting aside the verdict of a jury. The principle on which it acts is laid down in various cases, the most recent of which is the *Metropolitan Ry. Co.* v. *Wright*. (1) In giving judgment in the Court of Appeal, Lord Selborne, L.C., said: "I have always understood that it is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the trial is moved for might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to a jury, as to make it unreasonable and almost perverse that the jury when instructed and assisted properly by the judge should return such a verdict." And in the same case, when before the House of Lords, Lord Herschell states the principle thus: "The case was one unquestionably within the province of a jury; and, in my opinion, the verdict ought not to be disturbed unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find." The same principle was recognised by the Privy Council in *Brown* v. *Commissioner for Railways*. (2) Can we say that the present case falls within the rule thus laid down—that though the question was unquestionably within the

(1) 11 App. Cas. 152. (2) 15 App. Cas. 240.

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Lindley, L.J.

province of the jury, yet the jury, if they had viewed the whole of the evidence reasonably, could not possibly have found such a verdict? In my opinion, the case was brought within that rule. It appears to me that the verdict was so utterly irreconcilable with the evidence, when reasonably considered, that it ought to be set aside.

But this does not entirely dispose of the case. The question now arises whether the Court should simply order a new trial, or whether it should exercise the power of entering judgment for the defendants. That is a more difficult matter. Before the passing of Mr. Finlay's Act (53 & 54 Vict. c. 44) it was decided by this Court in *Millar* v. *Toulmin* (1) that on an appeal from an order of a Divisional Court upon an application for a new trial, the Court had power, under Order LVIII., r. 4, if all the facts were before the Court, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. Order LVIII., r. 4, of the Rules of the Supreme Court, 1883, provides that, "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court," and it goes on to say, "The Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." This rule gives the Court of Appeal a much larger power than the Divisional Court have under Order XL., r. 10, which provides that "upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of facts not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly." Upon the latter words of Order LVIII., r. 4, the Court of Appeal, in *Millar* v. *Toulmin* (1), decided that it was competent for this Court, upon an appeal from an order of a Divisional Court on a motion for a new trial, if it thought the verdict ought to be set aside, and was satisfied that it had before it all the evidence that could be reasonably expected to

(1) 17 Q. B. D. 603.

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be obtained, not only to set aside the verdict for one party, but also to enter judgment for the other party. In my opinion Mr. Finlay's Act (53 & 54 Vict. c. 44) has not deprived the Court of Appeal of this power. Sect. 1 in that Act enacts that from and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury, shall be heard and determined by the Court of Appeal, and not by a Divisional Court of the High Court." That section does not make a motion to set aside the verdict of a jury technically an appeal; but when the motion comes before this Court, it can, in my opinion, exercise with regard to the motion all the powers which it possesses as the Court of Appeal. I think, therefore, that though the present application is not technically an appeal, we can and ought to exercise the power conferred on us by rule 4 of Order LVIII., as we are satisfied that nothing will be gained by ordering a new trial. Consequently judgment will be entered for the defendants, with costs in both Courts.

LOPES, L.J. As to the principal question in this appeal, I am satisfied that the verdict was wrong. It was one which twelve men looking at the evidence reasonably could not have given. It was a perverse verdict, and in this view I am confirmed by the opinion of Hawkins, J. What then ought this Court to do? Beyond doubt, it ought at least to grant a new trial. But it was contended, and rightly as I think, that the Court ought to enter judgment for the defendants. I am clearly of opinion that the Court has the power to do this, and I am satisfied that if the case were sent to a new trial, no fresh evidence could be usefully given on behalf of the plaintiffs. All the materials are before the Court to enable it to deal with the case if it has power to do so. The 1st section of Mr. Finlay's Act has been already referred to; but I would also notice the rule which was made in August last under that Act, which provides, that "every motion for a new trial, or to set aside a verdict, finding, or judgment where there has been a trial thereof, or of any issue therein with a jury, shall be entered

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in the Court of Appeal, in the same way as motions by way of appeal to the Court of Appeal are now entered where there has been a trial without a jury. Such first mentioned motions shall be subject to Order XXXIX., r. 4, and shall be brought before the Court of Appeal in like manner as an appeal."

I think that the effect of that rule is to put a motion for a new trial in the same position as an appeal; and if that be so, a motion for a new trial will be governed by Order LVIII., r. 4. When we contrast that rule with the corresponding rule which applied to motions for a new trial in a Divisional Court, Order XL., r. 10, the difference in the language is very marked. Rule 10 of Order XL. contained the words, "Not inconsistent with the finding of the jury"; but there are no similar words in rule 4 of Order LVIII. This is a most important difference. Therefore, in my opinion, under the circumstances of the present case, the Court of Appeal has power to enter judgment for the defendants. *Millar* v. *Toulmin* (1) is a direct authority upon the construction of Order LVIII., r. 4, so far as it related to an appeal to the Court of Appeal before Mr. Finlay's Act; and if I am right in saying that motions for a new trial are now governed by the same rules, that authority is applicable to the present case. I ought to add, that when *Millar* v. *Toulmin* (1) came before the House of Lords (2) Lord Halsbury, L.C., expressed some doubt whether the Court of Appeal had the jurisdiction which they had exercised under Order LVIII., r. 4; but this was but a dictum; and the other lords, Lord Watson and Lord FitzGerald, expressed no opinion on this point. Therefore, the decision of the Court of Appeal is still binding on this Court.

KAY, L.J., after referring to the facts of the case, said:—I feel no doubt that the verdict was unreasonable and cannot stand. The other question is one of great importance and of some difficulty. The case comes before the Court not by way of an appeal proper, but on a motion for a new trial. The other branch of the Court of Appeal, in a recent case of *Heckscher* v. *Crosley* (3), held that as it was not the practice in the Queen's Bench Division to order

(1) 17 Q. B. D. 603. (2) 12 App. Cas. 747.
(3) [1891] 1 Q. B. 224.

security for costs of a motion for a new trial before Mr. Finlay's Act, the Court of Appeal would not make such an order now. Although I was a party to that decision, I felt some doubt about it. That decision certainly went some way to shew that motions for a new trial are not to be treated as appeals for all purposes; but now the question is whether the Court of Appeal has the same powers in dealing with applications in the nature of an appeal as it would have if they were appeals. The 10th rule of Order XL. did not treat a motion for a new trial as an appeal; but the language is changed in rule 4 of Order LVIII. That rule gives certain powers to the Court of Appeal which are not confined to appeals properly so called. The present application, though not strictly an appeal, is very much in the nature of an appeal, and has some of the same incidents. Such a motion may, for instance, ask to have a judgment set aside, for misdirection by the judge. The object of Mr. Finlay's Act was to prevent the necessity of going first to the Divisional Court and then to the Court of Appeal—to eliminate, in fact, the Divisional Court. It seems to me to follow logically, according to the true intent and meaning of the Act and the rule, that the Court of Appeal, when such an application comes before it, may exercise all the powers which it has as the Court of Appeal, and that in such a case as the present, it should, in order to save the parties the trouble and expense of a new trial, make the order which ought to have been made, where no further evidence can be given.

LINDLEY, L.J. I wish to add that we have consulted our colleagues in the other branch of the Court, who have carefully considered the point and agree in our decision.

Judgment entered for the defendants.

Solicitors for the plaintiffs: *Lewis & Sons.*

Solicitors for the defendants: *Torr, Janeways, Gribble, & Oddie,* agents for *Wells & Hind, Nottingham.*

M. W.

C. A.
1891
Feb. 23.

[IN THE COURT OF APPEAL.]

DREW AND ANOTHER *v.* WILLIS. EX PARTE MARTIN.

Practice—Charging Order—Application to rescind Order Absolute—1 & 2 *Vict. c.* 110, *ss.* 14, 15.

Where a charging order nisi, under 1 & 2 Vict. c. 110, ss. 14 and 15, has become absolute, the statute gives no power to rescind it.

APPEAL from a judgment of the Queen's Bench Division refusing to rescind a charging order.

After judgment was obtained in the action, an application was made ex parte, under ss. 14 and 15 of 1 & 2 Vict. c. 110 (1), for

(1) 1 & 2 Vict. c. 110, s. 14, enacts: "If any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." . . . .

Sect. 15 enacts: "In order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares, hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, every order of a judge charging any Government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance ex parte and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any Government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and if, after notice of such order to the person or persons to be restrained

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DREW v. WILLIS. EX PARTE MARTIN.

an order charging with the payment of the amount of the judgment, certain shares in the Colonial Securities Investment Company, Limited, standing in the name of the defendant. The application was granted, and an order made which ultimately became absolute. Subsequently the applicant, W. H. Martin, applied to a judge at chambers to discharge the order absolute, on the ground that the shares were his property, having been assigned to him by the defendant before the date of the judgment, although the assignment had not been registered.

The application was refused, and the refusal was affirmed by the Queen's Bench Division.

The applicant appealed.

David, in support of the appeal. The Divisional Court were bound by the decision in *Jeffryes* v. *Reynolds* (1); but it is submitted that that case was wrongly decided. Sect. 15 of the Act directs how the order nisi may be made absolute, and the proviso at the end of that section relates to the order absolute, and gives the Court full power over it on the application of any person interested. The applicant did not know of the order absolute till after it was made, so that he had no opportunity of appealing against it. If it cannot be set aside on such an application as the present, it will bind the company, and the applicant has no remedy for the embargo placed on his dealing with his property.

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thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, unless the judgment debtor shall within a time to be mentioned in such order shew to a judge of one of the superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

(1) 52 L. J. (Q.B.) 55.

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DREW v. WILLIS. EX PARTE MARTIN.

[He cited *Brereton* v. *Edwards*. (1)]

C. C. M. Plumptre, for the plaintiff, was not called on.

LORD ESHER, M.R. I am of opinion that *Jeffryes* v. *Reynolds* (2) was rightly decided. In this case each step required by ss. 14 and 15 of the Act has been followed up to the time when the charging order became absolute. This is not an appeal against the granting of the charging order, but it was an application to the Divisional Court to rescind the order, on the assumption that at the time it was made it was rightly made, but that it should be set aside on the ground that the applicant can shew that the shares are his. No Court has such a power of setting aside an order which has been properly made, unless it is given by statute. It is said that in the present case s. 15 gives that power by the proviso, and the words "such order" are relied on. It is clear to me that those words apply to the order nisi, and not to an order which has become absolute. That is the only enactment which is vouched as authorizing the judge at chambers to entertain this application. Then it is suggested that there is inherent power in the Court, either at common law or under its equitable jurisdiction. Certainly there is no such power at common law, and that there is none in a Court of Equity was shewn by the fact that, when asked to formulate an application to a Court of Equity, the learned counsel omitted, and rightly omitted, from his prayer any request that the charging order should be set aside. It has been suggested that if the applicant does not get this relief, he has no remedy. The questions whether he has a remedy, and, if so, what it is, and on what terms it would be granted, do not arise on this application, which, for the reasons I have given, must fail. The appeal will be dismissed.

FRY, L.J. I concur in thinking that *Jeffryes* v. *Reynolds* (2) was rightly decided. The last part of s. 15 provides for three things. It provides that, after notice to the judgment debtor, his attorney or agent, the order obtained ex parte shall be made absolute. It provides also that the order may, on the applica-

(1) 21 Q. B. D. 488. (2) 52 L. J. (Q.B.) 55.

tion of a party interested, be discharged or varied; but there is no provision for rescinding the order after it has become absolute. But then it is suggested that if the proviso be not read as referring to the order absolute, the applicant has no remedy, but that the order must stand affecting his property. I am far from convinced that that is the case, or that an absolute equitable interest is shut out because the interest of the judgment debtor has been charged by the order. Whether this is so or not, I am clear that the remedy is not by such a proceeding as the present, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for applicant: *Rooks & Co.*

Solicitors for plaintiff: *Burgess & Cosens.*

A. M.

HAMMOND *v.* SCHOFIELD.

Feb. 6, 17.

Practice—Joint Contractors—Judgment Recovered against One—Setting aside Judgment and adding co-Contractor as Defendant—Res Judicata.

The plaintiffs, a firm of printers, sued the defendant for the cost of printing for him a certain newspaper of which they supposed him to be the sole proprietor. There being no defence to the action, the defendant consented to final judgment being signed against him. After judgment had been so signed, the plaintiffs received information that at the time the work was done, one T. was a partner of the defendant, and joint proprietor with him of the newspaper. They accordingly, with the consent of the defendant, applied for an order that the judgment should be set aside, and that the writ should be amended by adding T. as a defendant in the action:—

Held, that the consent of the defendant to the setting aside of the judgment could not enable the plaintiff to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, and that there was consequently no jurisdiction to make the order.

APPEAL from chambers.

The plaintiffs, a firm of printers, printed a certain newspaper for the defendant. Subsequently, believing him to be the sole proprietor of the newspaper, they sued him alone for the cost of the printing. A summons for final judgment was taken out under Order XIV., and there being no defence to the action one Thomas, who acted as the defendant's solicitor and attended the summons on his behalf, consented to final judgment being signed against the defendant on September 18th, 1890. Failing to get

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satisfaction of their judgment, the plaintiffs on November 24th, 1890, on an affidavit stating that since judgment signed against the defendant they had been informed that Thomas was a partner of the defendant, and joint proprietor with him of the newspaper, with the consent of the defendant obtained an order in the Birmingham District Registry ordering that the judgment of September 18th, should be set aside, and that the writ should be amended by adding Thomas as a defendant in the action. That order was confirmed on appeal by Pollock, B. Thomas appealed to the Divisional Court.

W. Graham, for Thomas. As soon as judgment was once signed against the defendant, all remedy against Thomas, if any such ever existed, was gone. The cause of action had passed in rem judicatam. *King* v. *Hoare* (1); *Kendall* v. *Hamilton* (2). The plaintiffs cannot by getting the consent of the defendant to the setting aside of that judgment revive their remedy against Thomas. The Court will not set aside a judgment where to do so would interfere with vested rights. Thus, the Court has no power to extend the time for renewing a writ of summons, where the claim would, in the absence of such renewal, be barred by the Statute of Limitations. *Doyle* v. *Kaufman* (3); *Weldon* v. *Neal* (4).

Fillan, for the plaintiffs. The rule that judgment recovered against one of two joint contractors, although unsatisfied, is a bar to an action against the other, is so highly technical, that the Court will not extend it to the length of refusing leave to the parties to set it aside. Even assuming that the Court will refuse such leave where to grant it would prejudice the rights of innocent third parties, Thomas here is not wholly innocent, for when consenting to judgment against the defendant he concealed the fact of his own joint liability.

Cur. adv. vult.

Feb. 17. The following written judgments were delivered:—

WILLS, J. The plaintiff in this case sued a person with whom he had contracted for money payable for work done at his request.

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) 3 Q. B. D. 7.
(4) 19 Q. B. D. 394.

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By consent of the defendant a regular judgment was signed. Some time afterwards he discovered, or supposed he had discovered, that in respect of the work sued for the defendant's solicitor in the action had been jointly liable with the defendant. He applied to a district registrar with the consent of the original defendant and upon notice to the supposed partner, to set aside the judgment and join the supposed partner as a defendant. The registrar made the order, which the learned judge at chambers with some hesitation confirmed. In my opinion the order ought to be set aside. It is true that the supposed partner was solicitor for the defendant in the action, and on his behalf consented to judgment. But there was no defence to the action, and he did in this respect no less and no more than any stranger to the contract acting as solicitor for the defendant ought to have done. It is not suggested that he was guilty of any misrepresentation or fraud. The effect of the judgment was undoubtedly to destroy the right of action against a co-contractor with the defendant—*King* v. *Hoare* (1)—even though the plaintiff did not know when he signed judgment that he had a remedy against him: *Kendall* v. *Hamilton*. (2)

If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed. I am inclined to think (though it is not necessary to decide the question), that if it be regularly obtained, but through a slip on the part of the defendant, so that on an affidavit of merits it might be set aside, and it ultimately turns out that the defendant never was liable, it may equally be regarded as a judgment which never ought to have been signed, and would in such a case be properly treated as a nullity. If, being regularly obtained, though through a slip on the part of the defendant, and set aside upon an affidavit of merits, it ultimately turns out that the original defendant was liable, I do not think it could be treated, so far as the rights of other persons are concerned, as a nullity. Still less, when there is no pretence for saying that there is any ground for setting it aside upon the merits as between the plaintiff and the defendant, and when as between them it could only be set aside by consent.

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.

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I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability. Courts exist, as it seems to me, not to take away people's rights or increase their liabilities, but to enforce them, and I base my judgment upon this broad principle.

The question, however, is scarcely open to discussion.

In *Odell* v. *Cormack* (1), Hawkins, J., expressed his opinion that the setting aside by consent of the plaintiff and defendant of a judgment would have no effect against a co-contractor with the defendant (see the concluding remark in his judgment, at p. 228), and it seems difficult to entertain a doubt upon the point, since, whilst the judgment, a proper one in itself, was subsisting, the right of action was suspended, and it is a very old law that a right of action once suspended is gone. But the very question whether a judgment signed by consent can be set aside at the instance of the plaintiff and defendant to the prejudice of a third party has been decided by the Court of Appeal in the case of *The Bellcairn* (2). Had this case been cited to me there would have been no occasion to reserve our judgment. I have also had the advantage of reading my learned brother's judgment, and I agree with it.

VAUGHAN WILLIAMS, J. In this case the question is raised, whether where judgment has been obtained against one of two joint contractors the plaintiff and defendant in that action can by consent get the judgment set aside in order to enable the plaintiff in a fresh action or with an amended writ in the original action to sue the other co-contractor. It is urged on behalf of those who wish to set the judgment aside that they as the only parties to the action have a right to deal with the judgment in such manner as they please, and that the co-contractor, who is not sued, is a stranger who has no voice in the matter, and further, that if he has a voice, he has no right in the judgment which should make it a fraud on him that the parties to the judgment should agree to take steps by consent to have it set

(1) 19 Q. B. D. 223. (2) 10 P. D. 161.

aside. It is urged on behalf of the co-contractor, not a party to the judgment, that the effect of the judgment has been to make the contract pass in rem judicatam, and thus discharge him from all liability to the plaintiff in respect of the contract, and that his liability on the contract ought not to be revived without his being heard, and that if he is heard, he has a right to resist an order being made setting aside the judgment, because this would be an interference with his right that there shall not be two judgments in respect of one contract to which he is a party. It is of course settled law that where one of two joint contractors has been sued to judgment on the joint contract the other contractor may, if subsequently to the judgment an action is brought against him, plead the judgment obtained against his co-contractor in bar of such action; and it seems also to be well settled by a series of cases beginning with *Rice* v. *Shute* (1), and ending with *Kendall* v. *Hamilton* (2), that the basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract. These decisions seem to be the logical result of the rule of pleading that non-joinder of defendant is not matter which can be pleaded in bar, but only matter which can be pleaded in abatement. But it is difficult to see on what principle this rule of pleading can have been founded when it is remembered that non-joinder of a plaintiff could be pleaded in bar on the very ground that the contract sued on is at variance with the contract proved; because a contract with several plaintiffs is not one and the same contract as the contract with one plaintiff. Be this how it may, the rule seems thoroughly established that quâ defendants a contract with one of them is the same as the joint contract with the several—in other words, that the contract is different with regard to those who join as plaintiffs, but the same with regard to those who are joined as defendants.

Assuming then, as it seems one must, that the basis of the defence is the right of the co-contractor that there should be no

(1) 5 Burr. 2611. (2) 4 App. Cas. 504.

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further litigation of the judgment on the contract to which he is a party, the question remains, Ought the co-contractor to be heard on the question whether or not the judgment should be set aside, and if he is so heard, is it a good ground for him to urge that the ground upon which it is sought to set aside the judgment is the agreement by the parties to the original action in derogation of his right above mentioned? Now it seems to me that it cannot be that a co-contractor has any such right of hearing when it is sought to set aside the judgment on the merits, and it seems also clear that it would be a good replication to a plea of the judgment recovered that the judgment in question had been reversed or set aside. If this view is right, it would seem to follow that the co-contractor, not a party to the action in which the judgment had been obtained, has no right to be heard unless to set aside the judgment would be to violate or take away some right of his, and that to set aside a judgment on the merits is no violation of his individual right or his right as a citizen to insist on the rule "Interest reipublicæ ut sit finis litium" where a violation of a right established for the common good would do him a particular injury; for in the latter alternative the case does not fall within the rule for the common good. I am inclined, however, to think that where the application is to set aside the judgment by consent and not on the merits, it is a violation of the rule for the common good to allow this to be done for the mere purpose of reopening a finished litigation, and that the co-contractor is entitled to insist on the rule the violation of which would cause him particular injury. It is to be observed that no injustice is done to the original defendant, because he is entitled to come upon the co-contractor for contribution. If it is said that this decision works injustice to the plaintiff who loses his remedy against the co-contractor, of whose existence the plaintiff may not have been aware at the time of bringing the original action, this is only to say that the rule established by the series of cases ending with *Kendall* v. *Hamilton* (1), that a plaintiff who has sued one contractor to judgment cannot afterwards sue another contractor on the same contract even though he may not have been aware of his exist-

(1) 4 App. Cas. 504.

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ence when he brought the first action, is an unjust rule; for the injustice in the present case is precisely the same, apart from what seems to me the immaterial fact, that the original defendant is willing to assist the plaintiff to evade a rule which, though it may be unjust in its results to the plaintiff, is yet a well-established rule.

Since writing the above I have had the advantage of reading the judgment of Wills, J. The cases cited in his judgment, to which our attention was not called during the argument, only confirm the view intended to be expressed in this judgment.

Appeal allowed.

Solicitors for plaintiffs: *Hulbert & Crowe.*

Solicitor for Thomas: *Docker & Co.*

J. F. C.

JOYCE *v.* BEALL AND ANOTHER.

Feb. 4.

Practice—Discovery—Several Defendants—Deposit of 5l.—Order xxxi., r. 26.

A plaintiff who brings an action for one and the same cause against several defendants is, by Order xxxi., r. 26, entitled to discovery from all of them, on payment of one sum of 5*l.*, even although they sever in their defence.

APPEAL from chambers.

The plaintiff in an action for money had and received had taken out a summons asking that the defendants might be ordered to make and file an affidavit of documents. The master refused to make any order on the ground that the plaintiff had paid into Court one sum only of 5*l.* instead of two sums of 5*l.*, the defendants having severed their defences. On appeal, A. L. Smith, J., referred the matter to the Divisional Court.

Jan. 31. *J. G. Witt*, for the plaintiff. Under Order xxxi., r. 26, the party seeking discovery has a right to it on payment of 5*l.*, although he may be ordered to pay an additional sum if the costs are likely to exceed 5*l.* The words of rule 26 are plain. In *Campbell* v. *Poulett* (1) it was held that upon an application

(1) W. N. (1884), p. 48.

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for discovery against several co-plaintiffs the deposit of one sum of 5*l.* was sufficient. So in *Eder & Co.* v. *Attenborough.* (1) It is true that in *Liverpool and Manchester Aërated Bread and Café Co.* v. *Firth* (2), Stirling, J., held that where several defendants appeared separately and severed in their defences, separate deposits of 5*l.* each must be made by the plaintiff seeking discovery from them; but here the defendants appear by the same solicitor.

Cautley, for the defendants. There is a different cause of action against each of the defendants, and their defences are separate, although they have the same solicitor. The solicitor will be entitled to separate costs of the pleadings, affidavits of documents, &c. Order XXXI., r. 26, is to secure costs, as appears from rule 25, providing that in every cause or matter the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the Court or a judge, be secured in the first instance as provided by rule 26. A plaintiff may in the same action sue two defendants each for a distinct cause of action, but recover against one and fail against the other. If only one sum of 5*l.* were paid in for discovery how could the successful party get his costs in respect of it? If the plaintiff had made an application against one defendant and a subsequent application against the other, two sums of 5*l.* each must have been paid.

In *Smith* v. *Reed* (3), Field, J., at chambers ordered a plaintiff suing seven defendants to make the prescribed deposit in respect of each set of interrogatories delivered to them, and said that the object of the rule was to prevent the exhibition of useless interrogatories. The same reasoning applies to discovery otherwise than by interrogatories. That decision was followed in *Liverpool and Manchester Aërated Bread and Café Co.* v. *Firth* (2), by Stirling, J., after inquiring into the practice in both Divisions of the High Court. That was a case of discovery by an affidavit of documents, and is directly in point. The fact that there the defendants appeared by different solicitors makes no real distinction. See *In re Metropolitan Coal Consumers' Association.* (4)

(1) 23 Q. B. D. 130.
(2) [1891] 1 Ch. 367.
(3) W. N. (1883), p. 196.
(4) 45 Ch. D. 606.

Where there are individual parties with separate rights the word "party" in rule 26 refers to one only.

Witt, in reply.

Cur. adv. vult.

VAUGHAN WILLIAMS, J. (after stating the facts above set forth). In my opinion the learned master was wrong. Rule 26 of Order XXXI. provides that the party seeking discovery otherwise than by interrogatories has, before making application for discovery, to pay into Court the sum of 5*l*. It seems to me that the plaintiff in this case is a party so seeking discovery, and I do not see on what ground it can be said that he must pay into Court a further sum of 5*l*. It is quite true that rule 26 goes on to say that the party seeking discovery otherwise than by interrogatories may be ordered further to pay into Court such additional sum as the Court or a judge shall direct; this means such further sum as the judge shall in his discretion direct; but the master did not act on this portion of the rule; he did not purport to exercise a discretion in the matter. He simply held as a matter of practice that where a plaintiff sues more than one defendant he must, if he requires more than one affidavit of documents, pay an extra 5*l*. in respect of each affidavit which he requires. I see nothing in the order to justify this. There may be an action which really is not one action but two or more actions amalgamated under the same writ, as, for instance, where a plaintiff sues defendants alternatively, or where a plaintiff sues different defendants for different causes of action, e.g., distinct frauds alleged to be committed by them respectively. In such a case it seems to me that the plaintiff would really be a party to two distinct actions, and the defendants would in such cases be distinct parties; but the mere fact that there are more plaintiffs than one or more defendants than one does not prevent the plaintiffs collectively from being "a party," or the defendants collectively from being "a party," nor do I think that the fact that the defendants severed their defence prevents the defendants collectively being a party where they are sued jointly in substance as well as in form. In order to ascertain whether two actions are being brought it seems to me you must look at the

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alleged cause of action. This seems to me the only case in which the collective plaintiffs and the collective defendants do not fall within the term "party," and, therefore, the only case in which the plaintiffs or the defendants can be called on to make a second deposit of 5*l.*, although it may very well be that the number of the plaintiffs or the defendants may be a good ground for the judge in his discretion ordering a payment into Court beyond the 5*l.* Indeed, if this is not a ground on which the further payment may be ordered, it is difficult to see in what case a further sum can be ordered to be paid into Court, because it cannot be that the further sum depends on the length of the affidavit, which is unknown when the order is made. Inasmuch as I understand that in the present case the order was opposed both before us and before the master on the ground solely that a second sum of 5*l.* ought to be paid, I think that this appeal ought to be allowed with costs, and the order prayed for in the summons made.

CAVE, J. I am of the same opinion. I am authorized by Stirling, J., to say that in the case of *Liverpool and Manchester Aërated Bread and Café Co.* v. *Firth* (1) he did not intend to decide anything inconsistent with the decision in *Eden* v. *Attenborough* (2), by which he was bound.

Appeal allowed.

Solicitors for plaintiff: *Greenop & Sons.*

Solicitors for defendants: *Beall & Co.*

(1) [1891] 1 Ch. 367. (2) 23 Q. B. D. 130.

J. R.

IN RE TOBIAS & CO. EX PARTE H. A. TOBIAS. 1891

Bankruptcy—Order of Discharge—Power to reconsider absolute refusal of Order of Discharge—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104. *Jan.* 13; *Feb.* 16.

The Court has power under s. 104 of the Bankruptcy Act, 1883, to reconsider an absolute refusal of an order of discharge.

APPEAL of H. A. Tobias, a bankrupt, against a decision of the County Court Judge at Liverpool, refusing to grant him an order of discharge.

It appeared that the firm of Tobias & Co., which consisted of A. J. Tobias, the appellant's brother, and the appellant, were adjudicated bankrupt in June, 1884, and that on October 31, 1884, the bankrupts who, according to the report of the official receiver, had continued to trade after knowing themselves to be insolvent, and had brought on their bankruptcy by rash and hazardous speculations, were refused an order of discharge.

On October 17, 1890, the appellant applied "for an order for his discharge, notwithstanding the order of October 31, 1884, or in the alternative for an order reviewing the order of October 31, 1884." At the hearing, the application for an order to review the order of October 31, 1884, was withdrawn, and the judge refused to grant an order of discharge. It appeared that between 1884 and 1890, the appellant had been employed at salaries of from 30*s.* to 4*l.* a week, and had incurred no debts. The official receiver reported that, since the former application, he had paid over 2692*l.* trust funds held in America, to which he became entitled on his mother's death, with the result that, his separate creditors having been already paid in full, the creditors of the joint estate, who had till then only received a dividend of 3*d.* in the pound, had received an additional dividend of 2*s.* 6*d.* in the pound.

W. F. Taylor, for the appellant. The Court has jurisdiction to grant an order of discharge on a second application; and in this case one ought to have been granted, having regard to the good conduct of the appellant since the refusal. Sect. 28 of the Bankruptcy Act, 1883, does not in terms preclude a second

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application; and it is incredible that the legislature could have intended that the status of an undischarged bankrupt should be perpetual. This view is supported by the dicta of Cave, J., in *In re Lloyd, Ex parte Lloyd.* (1)

Muir Mackenzie, for the official receiver, did not oppose the application.

Cur. adv. vult.

Feb. 16. CAVE, J. This is an appeal against an order of the County Court Judge of Liverpool, refusing the bankrupt his discharge. The bankrupt and his brother traded as chemical brokers down to the summer of 1884, when they were adjudicated bankrupt. The present appellant applied for his discharge in October, 1884, which was refused on October 31 in that year. On October 17, 1890, the appellant applied de novo to the Court at Liverpool for an order of discharge, or in the alternative for an order reviewing the order of October 31, 1884. In the course of the hearing the bankrupt's counsel abandoned the application for a review, and the application de novo for a discharge was refused.

This case raises for our determination the questions which were discussed, but upon which no decision was given, in *Lloyd's Case* (1); and I may say at once that I think the learned judge was right in regarding that case as no authority upon the point which alone came before him. When, upon the hearing of the application of the bankrupt, the judge is of opinion that the applicant is not entitled to an absolute discharge, and also feels himself unable to fix a period of suspension, he may, in refusing to grant a discharge, reserve liberty to the bankrupt to apply again; and, if he does so, the bankrupt may apply again in pursuance of the leave reserved as a matter of right; but, having regard to the power of rehearing hereinafter referred to, I think it would be more convenient that in such a case the judge should refuse the discharge absolutely. When the discharge is absolutely refused, the bankrupt cannot apply de novo as a matter of right, as was sought to be done here; and in my opinion the learned judge was justified, after the abandonment

(1) 6 Mor. 297.

of the application for a review, in making the order which he did make. Indeed, I agree with him that he had no power to entertain the application, the refusal of October 31, 1884, having been, as he says, an absolute refusal.

Is, then, the position of a bankrupt whose order of discharge has been refused, and rightly refused, on his first application, an utterly hopeless one, and must he, no matter how exemplary his subsequent behaviour, be compelled to go through the remainder of his life as an undischarged bankrupt? I should be very sorry to think that this was so; and I agree with the learned judge of the county court that the refusal of a discharge is the very order above all others which may with advantage be reconsidered after the lapse of time. It appears to me that the power of reconsidering an absolute refusal is conferred on the Court by s. 104 of the Act of 1883, which provides that "every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." This section gives the Court a discretion of the widest and most far-reaching character; and, when properly exercised, it is so beneficial in its operation, and so calculated to advance the ends of justice, that I think it ought not to be restrained by construing it in any niggardly spirit. One general although not invariable rule has been laid down for guiding the Court in the exercise of its discretion under this section, viz., that the Court should not grant a rehearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the judge when he has let the time for appealing from the original decision go by. The universal practice of fixing a limit of time on the power to appeal is derived from the general maxim, "Interest reipublicæ ut sit finis litium"; but the maxim should not be extended beyond the limit of its utility. Where litigants have gone to trial and the Court has decided between them, it is inexpedient that the defeated party should be allowed to reopen the litigation at any distance of time, when the position of the parties may have been materially affected by the lapse of time or the loss of material evidence. In such a case as this, however, where the refusal of the discharge operates as a punishment on the bankrupt, there can be no reason

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why the punishment should not be remitted at any distance of time, if it can be shewn that the object of the punishment has been effected. No one is affected by the modification or rescission of such an order except the bankrupt himself, and to some extent society at large, which is benefited by the infliction of a punishment just in proportion to its justice and necessity, and is therefore injured and not benefited by the continuance of a punishment after the necessity for it has ceased.

I entertain no doubt that the judge was at liberty to hear an application to review the order of October 31, 1884, if he thought a primâ facie case was made out for such indulgence. What then ought to be done in this case, in which the application for a review was abandoned? We are told that it was abandoned because it was supposed (as it seems to me wrongly) that an application for a review could only be founded on evidence which might have been before the Court on the original application. I see nothing at all in the section itself to warrant this limitation. If the counsel for the bankrupt thought that this was the conclusion to be drawn from any expressions of mine in *Lloyd's Case* (1), I regret that I should have expressed myself in a way capable of misconstruction. The learned judge seems to have discussed the merits of the case in order that we might consider it upon the merits, if we were of opinion that he had power to hear the application; and, as I think he had the power to reconsider his former decision of October 31, 1884, I do not see why we should not proceed to deal with the case at once instead of sending the bankrupt to renew his application for a rehearing which would occasion considerable expense to all parties without any corresponding advantage.

The learned judge says he should have refused the application even if he had thought he had the power to rehear it, on the ground that the new facts did not bring the case (to use the judge's words), within the conditions sketched by me in *Lloyd's Case* (1). Now, if the judge will look at that case again, I think he will see that I sketched no conditions whatever, but was simply giving an instance by way of illustration; and I should be very sorry to lay down beforehand any conditions for limiting the

(1) 6 Mor. 297.

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judge's discretion as to the circumstances which might seem to him sufficient to induce him to vary his refusal of the discharge. In this particular case we are not informed which brother was the elder; but I think that, as Mr. Mackenzie has suggested, we may not unfairly assume from the position of the names in the firm that the applicant was the younger, and we know that he had not been in difficulties before, as the other brother had been. His conduct since the bankruptcy appears, as the judge says, to have been creditable. He has worked hard, held some responsible positions, lived on a narrow income, and not incurred any debts. He has also rendered to the official receiver every assistance in getting for the creditors a sum of 2680*l.* which came to him under his mother's marriage settlement. It does not appear which of the brothers was the leading spirit in the partnership affairs; but at first at all events the present appellant seems to have been more moderate in his drawings than his brother. Upon the whole, and having regard to the scale of punishment which has been adopted under the Act of 1883, I am of opinion that a suspension of the applicant's discharge for nearly seven years is a sufficient punishment, and that he should now have his discharge. As, however, the appellant has adopted the wrong mode of procedure, and only succeeds in getting his discharge by our indulgence, he must pay his own costs, and the official receiver will take his costs out of the deposit.

VAUGHAN WILLIAMS, J., concurred.

Order accordingly.

Solicitors for appellant: *T. Whitley & Co.*

Solicitor for respondent: *Solicitor to the Liverpool Board of Trade.*

H. D. W.

C. A.
1890
Dec. 10.

[IN THE COURT OF APPEAL.]

MILLER *v.* DELL.

Limitations, Statute of—Conversion—Demand and Refusal—Lease— 21 *Jac.* 1, *c.* 16.

A lease belonging to the plaintiff was fraudulently taken from him by his son, and was deposited, without the plaintiff's knowledge, with B. in 1881 as security for the repayment of money lent by B. B. held the lease without knowledge of the fraud. B. having become bankrupt, his trustee in 1889 assigned the debt to the defendant and handed the lease over to him. Subsequently the plaintiff demanded the lease of the defendant, and upon his refusal to return it brought an action for detinue and conversion, to which the defendant pleaded the Statute of Limitations:—

Held, that the Statute of Limitations began to run from the time when the plaintiff first had a complete cause of action against the defendant, irrespective of the question whether he had a previous cause of action against B.; that the statute therefore only began to run from the date of the demand and refusal, and was no answer to the action.

Wilkinson v. *Verity* (Law Rep. 6 C. P. 206) considered.

Quære, whether the original receipt of the lease by B. was sufficient evidence of a conversion by him.

APPLICATION by the plaintiff to set aside the judgment entered for the defendant at the trial before Charles, J., and a common jury, and to enter judgment for the plaintiff or for a new trial.

The facts were as follows: The plaintiff was the owner of the lease of a house used by him as a refreshment house; the plaintiff's son managed the business for him, and there was an agreement between the plaintiff and his son for an assignment of the lease to the latter upon certain conditions; the conditions, however, were not performed, and the son never became entitled to have an assignment of the lease made to him. In 1881, more than six years before the commencement of this action, the plaintiff's son, without the knowledge or consent of the plaintiff, deposited the lease with one Bates to secure an advance of 150*l.*, and signed an ordinary memorandum of deposit containing an agreement to execute a legal mortgage of the premises if and when called upon. Within six years of the commencement of the present action Bates became bankrupt, and in 1889 the

trustee under his bankruptcy sold his business to the defendant, including the debt of 150*l.*, and handed over to him the lease which had been deposited as security. Subsequently the plaintiff demanded the return of the lease from the defendant, and upon his refusal to give it up commenced this action for detinue and conversion of the lease, to which the defendant pleaded the Statute of Limitations (21 Jac. 1, c. 16). At the trial the learned judge, acting upon the authority of *Wilkinson* v. *Verity* (1), held that the action was barred by the statute, and directed judgment to be entered for the defendant.

Crump, Q.C., and *Morton Smith*, for the plaintiff. The Statute of Limitations only runs from the time when the plaintiff's cause of action against the defendant arose, and the plaintiff had no cause of action against the defendant until demand of the lease and his refusal to return it. Assuming that the plaintiff had a good cause of action against Bates in respect of a conversion by him, that cannot affect his rights against the present defendant, against whom the plaintiff had no cause of action until 1889.

The case of *Wilkinson* v. *Verity* (1) is not in point. It is true that Willes, J., in the course of his judgment, says: "It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded"; but in that case all the acts of conversion had been committed by the defendant himself, and the language of Willes, J., must be interpreted with regard to that state of facts; it is inapplicable to the case of a prior act of conversion by a person other than the defendant. But the mere deposit of the lease with Bates did not amount to a conversion by him; for until demand and refusal to give up title deeds to the real owners there is no conversion of the deeds, and the real owners have no right of action against which the statute would run: *Spackman* v. *Foster*. (2)

R. M. Bray, for defendant. The deposit of the lease with Bates was a conversion both by the plaintiff's son and by Bates,

(1) Law Rep. 6 C. P. 206. (2) 11 Q. B. D. 99.

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for the latter thereby took possession of it as against its rightful owner; that his act amounted to a conversion appears from the decision in *McCombie* v. *Davies*. (1) A demand and refusal are not necessary elements of a conversion. The language of Willes, J., in *Wilkinson* v. *Verity* (2), is general and unambiguous, and shews clearly that where there has been a prior act of conversion the statute begins to run from the time of that act. The defendant is entitled to all the rights of Bates, and the cause of action against Bates having lasted for six years without an action having been brought in respect of it, the statute applies for all purposes, and the judgment of the learned judge at the trial was right.

LORD ESHER, M.R. This is an action for wrongful conversion or detinue of a lease. Whatever the defendant did in regard to the lease, whether his acts amounted to detinue or conversion, is immaterial, for in either case it was within six years of the commencement of this action, and if there were nothing more, the Statute of Limitations would be no bar to the plaintiff's claim against the defendant. But what the defendant relies on is that Bates converted this lease to his own use more than six years ago, and it is contended that this was the first wrongful conversion, and that the statute runs from the time when that first wrongful conversion occurred. The case of *Wilkinson* v. *Verity* (2), was cited in support of this contention at the trial before Charles, J., and especial reliance was placed on a passage in the judgment of Willes, J. (at p. 209), who says: "It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded." But it is plain that Willes, J., was there dealing with a case in which the defendant himself and nobody else was charged with the wrongful detention. The defendant himself was the sole wrongdoer, and the language of the passage relied upon, though general in its terms, must be applied to such circumstances as those in that case. Moreover, Willes, J., immediately goes on to give the following illustration: "As for

(1) 6 East, 538. (2) Law Rep. 6 C. P. 206.

instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment"—language which shews that what he meant was, that where there was a valid cause of action against the defendant by the plaintiff, the statute began to run from the time when that cause of action arose.

In the present case, it is sought on behalf of the defendant to extract from that decision this doctrine—that if one man is guilty of a wrongful conversion, and afterwards a second man is guilty of a wrongful conversion of the same thing, then the cause of action against the second man is barred by the statute if the cause of action against the first man accrued more than six years before action, although the conversion in respect of which the second man is sued may have occurred within the six years, or indeed within six months. It is said that to hold otherwise would be contrary to reason and natural law; that is to say, that because the legislature, in order to prevent litigation after a certain period, has said that no action shall lie against A. in respect of an act done by him more than six years before action brought, therefore B. cannot be sued in respect of an act done by him within the six years. To me that proposition seems contrary to reason; but whether it be so or not, I am of opinion that in the present case the Statute of Limitations does not apply; it applies only to an action brought against the defendant in respect of a wrongful act done by the defendant himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations though more than six years may elapse, and if the rightful owner recovers them the other man cannot maintain an action against him in respect of them. I think that the effect of the judgment in *Wilkinson* v. *Verity* (1), was misconceived by the learned judge, and that that case is no authority in favour of the defendant.

The other case which was cited to us, that of *Spackman* v. *Foster* (2), seems to be applicable to the present, especially upon the point that a lease, being a document of title, is not a mere

(1) Law Rep. 6 C. P. 206. (2) 11 Q. B. D. 99.

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chattel, and that therefore where title deeds are fraudulently taken from the rightful owners and deposited with a third person, until demand and refusal to give up the deeds to the real owners they have no right of action against the third person against which the statute would run. Whether the statute would run to prevent a person rightfully in possession of land getting back his documents of title more than six years after their conversion, is a question which would require consideration, and I do not say that he could not get them back though they had been wrongfully held for more than six years. This appeal must be allowed, and judgment entered for the plaintiff.

LOPES, L.J. I am of opinion that the Statute of Limitations is no bar to this action, and that it does not operate to deprive the plaintiff of his remedy; to make this clear it is only necessary to look at the form of the plea of the statute under the Common Law Procedure Act, 1852. The cause of action in respect of which the present plaintiff is suing is a cause of action against the defendant, because the latter has possession of a lease to which the plaintiff is clearly entitled, and the evidence in support of it is a demand made by the plaintiff and a refusal by the defendant within the six years; therefore the cause of action is a conversion, proved by demand and refusal, and arose within the six years. Looking at the form of plea given in Sched. B., Form 39, to the Common Law Procedure Act, 1852, it runs, "That the alleged cause of action did not accrue within six years before this suit." What is the cause of action? It is the cause of action which the plaintiff has against the defendant, and none other; in this case it has accrued long within six years, and the plaintiff has not lost his remedy. I think that the learned judge misconstrued the case of *Wilkinson* v. *Verity* (1), which might possibly have been applicable to an action against Bates, but cannot apply to an action against the present defendant.

KAY, L.J. I am entirely of the same opinion. The plaintiff was the owner of a certain leasehold property, which he had agreed to assign to his son upon certain terms; the son did not carry out the

(1) Law Rep. 6 C. P. 206.

terms and never became entitled to have an assignment executed. In 1881 the son obtained possession of the lease, which he deposited with Bates, intending by such deposit to mortgage the leasehold interest in the land, and not to pledge or part with the chattel as something separate from the land; this intention is shewn by the memorandum of deposit. Bates became bankrupt, and within six years of the commencement of this action the trustee of his estate sold the debt to the defendant, and handed over this lease to him. Subsequently the plaintiff, who was the real owner of the leasehold interest, and therefore of the lease, demanded it from the defendant, who refused to give it up. These facts seem to be almost identical with those in *Spackman* v. *Foster* (1), in the course of the judgment in which case Grove, J., said: "The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositee or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and non constat that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion . . . . On the whole, I think that there was no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds." In these remarks I entirely concur, and am clearly of opinion that in the present case there was no cause of action against the defendant upon which the statute could operate until demand of the lease and refusal by him to give it up. The decision of the learned judge at the trial must therefore be reversed.

Appeal allowed.

Solicitors for plaintiff: *Sandom, Kersey, & Knight.*
Solicitor for defendant: *Herbert Nield.*

(1) 11 Q. B. D. 99.

W. J. B.

C. A.
1891
Jan. 14.

[IN THE COURT OF APPEAL.]

PITTARD *v.* OLIVER.

Defamation—Slander—Privileged Occasion—Meeting of Poor Law Guardians —Presence of Reporters at Meeting.

At a meeting of a board of guardians, of which the plaintiff had been the clerk, the defendant, a member of the board, in the course of a discussion concerning the plaintiff's accounts made certain defamatory statements concerning the plaintiff, without malice and bonâ fide believing that what he said was true. In accordance with the regular custom of the board, reporters were present at the meeting:—

Held, that the privilege which would have attached to the statements, if made in the presence of guardians only, was not taken away by the presence at the meeting of reporters or persons other than guardians.

APPLICATION by the plaintiff to set aside the judgment entered for the defendant at the trial before Mathew, J., and a special jury, and to enter judgment for the plaintiff or for a new trial.

The action was brought to recover damages for slander. The plaintiff was for twenty-five years clerk to the guardians of the Brentford Union, and in this capacity had received from time to time sums of money for which it was his duty to account to the guardians. In 1888 there was a sum of money in his hands belonging to the guardians, and a dispute arose as to the state of accounts between him and them, the plaintiff contending that a larger sum was due to him from the guardians than that which he had in his hands belonging to them, and that the accounts, when taken, would shew a balance in his favour. The accounts were submitted to an auditor, and after he had made his report the plaintiff was called upon to explain his accounts, when he adhered to his contention that there was a balance due to himself from the guardians. In the end the plaintiff resigned his appointment. The defendant, who was the vicar of the parish, was about this time elected a member of the board of guardians, and at the first meeting attended by him, on September 26, 1888, made use of the language complained of by the plaintiff. At that meeting it was proposed that a sum of 39*l.* 16*s.* 8*d.*, the amount of salary due to the plaintiff, together with an additional

sum of 50*l.*, should be paid to the plaintiff in settlement of his claim against the board, to which the defendant, who admittedly knew nothing of the plaintiff personally, moved as an amendment, "that 39*l.* 16*s.* 8*d.* be paid Mr. Pittard in full settlement of his claim without prejudice. The fierce light which had lately been thrown upon public boards prevented them from condoning in any way the defalcations of an unfaithful servant. Surely they could defend themselves and the public against a man who for years had been robbing public money by not giving him one farthing more than he could claim." This was the slander complained of. Shortly after this meeting, on November 6, 1888, the plaintiff brought an action against the board of guardians to recover the amount which he claimed to be due to him, to which the guardians counter-claimed for moneys which they alleged to be due to them from the plaintiff. The action was sent to an official referee, who after investigation found in favour of the plaintiff for the whole amount claimed by him, and also found in his favour on the counter-claim of the guardians. The present action for slander was thereupon brought by the plaintiff. At the trial, the jury, in answer to the question put to them by the learned judge, found "that the words were spoken honestly in the discharge of a public duty, without malice, but carelessly," and gave the plaintiff a verdict for forty shillings damages. Upon further consideration on motion for judgment, Mathew, J., held that the occasion on which the words were spoken was privileged, and directed judgment to be entered for the defendant.

Candy, Q.C., and *H. Kisch*, for the plaintiff. The learned judge was wrong in entering judgment for the defendant. It is true that if only guardians had been present at the meeting the occasion would have been privileged; but to the knowledge of the defendant reporters were present, and their presence destroyed the privilege; such discussions, in order that privilege may attach to them, should be held with closed doors: *Purcell* v. *Sowler*. (1) The case stands on the same footing as giving a false character of a servant to an employer in the presence of a third person,

(1) 2 C. P. D. 215.

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PITTARD v. OLIVER.

which is not merely evidence of malice, but of itself destroys the privilege. *Williamson* v. *Freer* (1), is a clear authority to shew that defamatory statements, even if privileged as regards the person to whom they are made, are not privileged if made in the presence of a third person.

[LORD ESHER, M.R. That case merely shews that though the communication to the girl's father was privileged, the communication to a third person (that is, the telegraph clerk), on another occasion, was not.]

The test is whether the mode of communication is reasonable and necessary: *Lawless* v. *Anglo-Egyptian Cotton Co.* (2)

[They also cited *Popham* v. *Pickburn.* (3)]

Lockwood, Q.C., and *Johnstone Watson*, for the defendant, were not called upon.

LORD ESHER, M.R. I am of opinion that this application should not be allowed. The plaintiff accuses the defendant of having slandered him, and the defence alleges that the words were spoken on a privileged occasion and without malice; it is not denied that the words complained of were in fact spoken. If not spoken on a privileged occasion the words were clearly slanderous, and therefore the defence is that though the language was defamatory, and was language for which the defendant would have been liable if the occasion was not privileged, yet it was spoken without malice upon a privileged occasion. The jury found that the words were spoken without malice, adding the meaningless rider "carelessly," and the question for us is therefore reduced to the one point, whether the occasion on which the words were spoken was privileged.

The defendant was a member of a board of guardians; a discussion took place at a meeting of the board with reference to the plaintiff, who had been a servant of the board, and a question arose whether the salary which was due to him should be paid in full, or whether the guardians should keep back a part of it on the ground that there had been defalcations by their servant of money which was in his hands for his masters, the guardians. That

(1) Law Rep. 9 C. P. 393. (2) Law Rep. 4 Q. B. 262, at p. 267.
(3) 31 L. J. (Ex.) 133.

is a matter which, it is not denied, it was the duty of the guardians to discuss; they were responsible to the ratepayers for the expenditure of their money; they were in the position of trustees for the ratepayers, and it was their duty to see that the money was properly expended; therefore, what the defendant and other guardians did in giving their opinion, was not only their privilege, but their duty. One of the guardians proposed to give the plaintiff the actual sum which, from the accounts, they believed to be due to him; another proposed to give him 50*l.* in addition; and the defendant, having an honest and bonâ fide opinion that the extra 50*l.* ought not to be paid to him, moved an amendment: this it was his duty to do. Then the defendant gave his reasons for thinking that the money should not be paid, and unquestionably those reasons amounted to a statement that the plaintiff had embezzled the money of the guardians. The jury found that he made the statement bonâ fide believing it to be true; but as a fact it was not true—not indeed in the sense that it was a falsehood, but in the sense that it was incorrect. If that statement was not made on a privileged occasion, the defendant is liable; if the occasion was privileged, he is not.

If the words had been spoken at a meeting where only guardians were present, it is not denied that the occasion would be privileged, and the privilege would attach upon the ground that it was his duty to make the statement if he believed it to be true. As a fact, there were other persons than guardians present at the meeting; but it was not shewn that those other persons were not ratepayers; if they were ratepayers, they were persons in whose interest the guardians were discussing the question, and the question arises whether their presence would take away the privilege. It is asserted that it would; but the ratepayers were obviously persons interested in the payment of this money out of the rate, and I cannot for a moment doubt that the privilege was not taken away by their presence.

But I will assume that the persons present, in addition to the guardians, were not ratepayers; it is suggested that they were reporters; but if they were so, it would in my opinion make no difference. If a person whose duty it is to make a statement to certain persons calls in other persons to whom he owes no duty

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to make the statement, in order that those other persons may hear it, I should be inclined to say (though it is unnecessary to the decision of the present case), that it would not become his duty to refrain from making his statement to the proper persons, but that there would be evidence of malice in his making it in the presence of others who might promulgate it. In the present case, it must be assumed that the defendant did not call in the reporters, for it is not suggested that he did. What then was his position? He could not order them out of the room, for there were several guardians present, and we must assume that the reporters were allowed to be present by the guardians as a body, over whose acts the defendant had no control; he could not prevent the reporters being present. Was then his duty to the guardians and to the ratepayers generally taken away by the presence of these other persons who were not called in by him and over whose presence he could exercise no control? The question answers itself: the presence of these persons left his duty to discuss the matter untouched; the occasion was privileged for the performance of that duty, and the privilege was not taken away by the presence of such people under such circumstances. I think, therefore, that the learned judge was right in ruling that this was a privileged occasion.

It is said, however, that the effect of our decision is to overrule decided cases. To this I do not assent. The case of *Williamson* v. *Freer* (1), which was tried before me, was wholly different to the present case; there the defendant, who was the plaintiff's master, thought that she had committed a felony, and had he written to her father or mother to come and see to her, no doubt his written communication would have been privileged, it being a communication made to the girl's legal guardians. Unfortunately he did not adopt this humane course, but sent a telegram to her father, in which he charged her with felony, which telegram was necessarily read and copied by the telegraph clerks; and the Court held that such a mode of transmitting the communication was not privileged, for it was not merely a saying of the things to the father in the presence of somebody else, but was a separate saying of them to the telegraph clerks. Similarly,

(1) Law Rep. 9 C. P. 393.

if a person desired to defame another to himself, and were to write an abusive letter to him, but only to him, there would be no publication of the defamatory matter, and no question of privileged communication would arise; if, however, he wrote it on a post-card, there would be a publication to the post-office clerks, for which privilege certainly could not be claimed. Such cases are very different from the present.

Then there is the class of cases where something is said at a place and time and under circumstances which make it a privileged occasion; but the matter is subsequently published in a newspaper, and the question arises whether the newspaper proprietor can avail himself of the defence that the occasion was privileged. Sometimes he can, as in cases where the publication is for the benefit of all the public, such as proceedings in a court of justice, the publication of which is privileged on that ground—a ground which applies also to the publication of parliamentary debates. Other cases might be mentioned where a newspaper proprietor has asserted the same privilege, and in cases where the publication has been for the public benefit the privilege has been extended; but where the matter, though privileged when it is said, has yet no interest for the public, it has been held that the publication in a newspaper is not a publication on a privileged occasion, for the newspaper proprietor can only be publishing it for his own advantage, or to gratify some feeling of malice. That is the meaning of the decision in *Purcell* v. *Sowler* (1), and the effect of what the Court said in that case was that, though the occasion was privileged as regards the time and place at which the words were spoken, and as regards the person who spoke them, yet the matter was not one of public interest, and therefore the publication in the newspaper was not privileged. Cockburn, C.J., seems to have suggested that it would have been better if reporters had not been present when the words were spoken; but he did not suggest that it was illegal for them to be there, or that their presence took away the privilege. I am clearly of opinion, therefore, in the present case, that the occasion was privileged, and that the action cannot be maintained.

(1) 2 C. P. D. 215.

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SIR J. HANNEN. I am of the same opinion. The question of malice has been eliminated by the jury, and we have only to deal with that of privilege. In *Purcell* v. *Sowler* (1), all the judges say that it is discretionary with a board of guardians whether they shall admit the public to their meetings or not. In the present case the defendant, being one of the board of guardians, not only had the privilege of discussing the question before the board, but it was his duty, as a representative of the ratepayers, to state the opinion which he entertained upon it, and it has been found by the jury that he honestly and bonâ fide believed the statements which he made to be true. This finding must be accepted as shewing that what he said was not put hypothetically, but was a statement of what he believed to be the fact. It was his duty to make use of what he believed to be true, and the admission of the public to the meeting at which he used the language complained of was in no way his doing, but that of the general body of guardians. That is the ground on which I chiefly rest my judgment. The defendant had nothing to do with the introduction or presence of these persons, who were brought there by the general body; therefore, when he was called upon to do his duty under those conditions, the presence of the reporters made no difference; they were there for their own purposes. The duty of the defendant remained the same—to state his honest opinion in the condition of things brought about by the action of the board, and that duty he did not exceed.

Cases have been cited to us dealing with the subject of the privilege attaching to the publication in a newspaper of reports of such proceedings; but the privilege of the newspaper proprietor stands on a totally different footing to that of the person who utters the words. This distinction is clearly stated in *Purcell* v. *Sowler* (1), especially in the judgment of Bramwell, L.A., who says: "There was no duty to report such ex parte proceedings; if the guardians did not exclude strangers, as they might well have done, the reporter ought to have taken care what he was about, and not to have reported libellous matter; and the defendants, having published it, must take the consequences." That judgment only dealt with the subsequent

(1) 2 C. P. D. 215.

publication of the proceedings in the newspaper, the original publication of which at the meeting was privileged. I think, therefore, that in the present case the learned judge at the trial came to a correct conclusion upon the ground that, although other persons than guardians were present at the meeting, they were not brought there by the defendant, but were present in accordance with a general custom of the board of guardians.

FRY, L.J. I am of the same opinion. The defendant owed a duty to his fellow-guardians and to the ratepayers to bring forward the amendment which he bonâ fide believed to be a right and proper amendment, and to support it with arguments and statements of fact; that duty, as the jury have found by their verdict, he has not exceeded. This board of guardians had an established practice of admitting the public to their meetings; but that did not lessen, infringe, or take away the duty of the defendant to bring forward and support his amendment, which he was bound to do, notwithstanding the presence of the public or of reporters. The privilege of the defendant was plainly co-extensive with his duty; the occasion on which he uttered the words was privileged, and this application must fail.

I only wish to add that, in discussions of this character it is very desirable that guardians should bear in mind what was said by Cockburn, C.J., in *Purcell* v. *Sowler* (1), and hold them, wherever possible, in camerâ. In the present case, however, it must be remembered that the discussion arose, not on a proposition to take proceedings against the plaintiff, but on a motion for paying money to him.

Appeal dismissed.

Solicitor for plaintiff: *Alexander Pope.*

Solicitors for defendant: *Charles Robinson & Co.*

(1) 2 C. P. D. 215.

W. J. B.

1891
Jan. 21.

WESTMORE *v.* PAINE.

Justices—Practice—Application to state Case—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.

By the Summary Jurisdiction Rules, 1886, r. 18, an application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing. . . .

The appellant having been convicted by a court of summary jurisdiction, consisting of five justices, made an application in writing for a case to two only of such justices, who stated and signed the case :—

Held, that the appellant had not complied with the directions of the rules under s. 33, and that there was consequently no power to state the case.

Case stated by two justices of the borough of Dover under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33, subject to the preliminary point whether a legal application was made so as to give them jurisdiction to state such case.

At a court of summary jurisdiction composed of five justices of the borough, two of whom were the justices who stated the case, the appellant was convicted upon an information for neglect of duty, contrary to s. 243 of the Merchant Shipping Act, 1854. The conviction was signed by the five justices constituting the Court. Immediately after the decision of the Court had been given, the appellant's counsel applied orally for a case to be stated on questions which arose during the hearing of the information, and the Court acceded to the application. The appellant, within seven days after the hearing of the information, served on each of the two justices aforesaid a written application, addressed to them only, to state a special case. He, on the same day, also served a copy of the application upon the clerk of the Court, and he had duly entered into a recognizance as required by the statute.

Having regard to *Lockhart* v. *Mayor of St. Albans* (1), and the cases cited therein, the two justices were doubtful if 42 & 43 Vict. c. 49, s. 33, and r. 18 of the Rules of 1886 (2), made under

(1) 21 Q. B. D. 188.

(2) By 42 & 43 Vict. c. 49 (Summary Jurisdiction Act, 1879), s. 33 :—

(1.) "Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in

that Act, had been complied with so as to give them jurisdiction to state the case, and they accordingly stated it subject to the opinion of the Court whether or not they had jurisdiction so to do.

Corrie Grant, for the appellant. The case was one to be tried "by a court of summary jurisdiction consisting of two or more justices:" Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 20, sub-s. 9. By s. 50, the expression "court of summary jurisdiction" shall mean—any justice, or justices of the peace, or other magistrate, . . . to whom jurisdiction is given by, or who is, or are authorized to act under the Summary Jurisdiction Acts. . . . And by the Summary Jurisdiction Act, 1884, 47 & 48 Vict. c. 43, s. 7, the definition of "court of summary jurisdiction" in s. 50 of the Act of 1879 is explained to include justices whether acting under the Summary Jurisdiction Acts, or any other Act, or by virtue of their commission, or by the common law. The Rules of 1886, r. 18, have been complied with. Two justices may constitute a Court, and, in the present case, two have been duly served with written notice of appeal. All of the justices consented to the case being stated. It is practically difficult to serve each member of a large bench of magistrates who may not often meet, and may live at a distance from the Court. In *Lockhart* v. *Mayor, &c., of St. Albans* (1), the notice in writing was not served upon any of the justices, but only on their clerk; and in *South Staffordshire Waterworks Company* v. *Stone* (2), there was no written application to the justices, but only a notice of appeal given to their clerk. So also in *Ex parte Curtis* (3) an appeal under the Licensing Act, 1872.

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point of law, or is in excess of jurisdiction, may apply to the Court to state a special case. . . .

(2.) "The application shall be made, and the case stated within such time and in such manner as may be from time to time directed by rules under this Act. . . ."

By the Summary Jurisdiction Rules, 1886, r. 18, an application to a Court of Summary Jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case, shall be made in writing, and a copy left with the clerk of the Court, and may be made at any time within seven clear days from the date of the proceeding to be questioned. . . .

(1) 21 Q. B. D. 188.

(2) 19 Q. B. D. 168.

(3) 3 Q. B. D. 13.

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WESTMORE v. PAINE.

Finlay, Q.C., and *Mansfield*, for the respondent, did not insist on the preliminary objection.

POLLOCK, B. As both parties wish this case to be argued, we regret that we have no power to hear it; but the statutory conditions precedent to the hearing have not been fulfilled. By the Summary Jurisdiction Rules of 1886, r. 18, "an application to a court of summary jurisdiction, under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case, shall be made in writing, and a copy left with the clerk of the Court, and may be made at any time within seven clear days from the date of the proceeding to be questioned." The application must be made in writing to the Court. It may no doubt be inconvenient to get the same members of the Court together again. But the party desiring the case to be stated might serve a written application for it on each member of the Court, and so serve the Court. In the present case an oral application was made to the Court which was sitting, and they consented to grant a case; but the applicant, instead of serving a written application on the Court then sitting, afterwards made an application in writing to two only of the justices, and they stated the case. If that would suffice, any two members of the Court, even if they differed from the opinion of the majority, might state a case, and the manner in which it was stated might depend on the views of those members of the Court who undertook to state it. The case could not be properly said to have been stated by the Court. It is clear from the decisions in *South Staffordshire Waterworks Company* v. *Stone* (1), and *Lockhart* v. *Mayor, &c., of St. Albans* (2), that the statutory requirements as to proceeding by case stated are conditions precedent of the right of appeal, and cannot be waived by the parties or justices.

CHARLES, J., concurred.

Appeal dismissed.

Solicitors for appellant: *Shaen & Roscoe.*

Solicitors for respondent: *Bower, Cotton, & Bower.*

(1) 19 Q. B. D. 168. (2) 21 Q. B. D. 188.

J. R.

THE QUEEN *v.* COMMISSIONERS OF INLAND REVENUE.
OHLSON'S CASE.
GARLAND'S CASE.

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Dec. 1.

Pawnbroker—Licence—Magistrate's Certificate—Exemption from necessity of obtaining Certificate—Pawnbrokers' Act, 1872 (35 & 36 *Vict. c.* 93), *s.* 39.

By s. 39 of the Pawnbrokers' Act, 1872, a pawnbrokers' licence is only to be granted to an applicant upon the production of a magistrate's certificate, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such certificate":—

Held, that the exemption in favour of a pawnbroker licensed at the commencement of the Act was not confined to the business which was then actually carried on by such pawnbrokers, but was a general exemption of favour of all persons who were then licensed pawnbrokers, and that therefore after the commencement of the Act such a licensed pawnbroker, his executors, administrators, assigns, or successors, could open a new business upon payment of the licence duty without the production of a magistrate's certificate.

ORDER nisi for a mandamus to the Commissioners of Inland Revenue, commanding them to grant to George Henry Ohlson, pursuant to the provisions of 35 & 36 Vict. c. 93, a licence for carrying on his business as a pawnbroker at premises known as 9, Woodberry Terrace, Stamford Hill, upon payment by Ohlson of the duty payable by him in respect of the said licence, and without requiring the production by him of a magistrate's certificate in that behalf.

A similar order nisi had been obtained in the case of David Garland in respect of premises at Teddington.

By s. 37 of the Pawnbrokers' Act, 1872 (35 & 36 Vict. c. 93), every pawnbroker is to take out from the Commissioners of Inland Revenue an excise licence for carrying on his business, and a separate licence is to be taken out and paid for by a pawnbroker for each pawnbroker's shop kept by him. By s. 39 a pawnbroker's licence is not to be granted to any person except on the production and in pursuance of the authority of a certificate granted under the Act, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such a certificate." Sect. 40 provides that certificates

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under the Act are to be granted by metropolitan police magistrates, stipendiary magistrates, or justices in their several jurisdictions; s. 42 provides for the notices to be given by a person applying for the first time for a certificate under the Act; and s. 43 enacts that a certificate is only to be refused upon the ground that the applicant has failed to produce satisfactory evidence of good character, that the shop in which he intends to carry on his business, or any adjacent house or place owned or occupied by him, is frequented by thieves or persons of bad character, or that he has not complied with the provisions of s. 42. The Act came into operation on January 1, 1873.

The facts of Ohlson's case, as they appeared upon the affidavits filed, were shortly as follows: Prior to December 31, 1872, one William Creshull was a licensed pawnbroker within the meaning of s. 39 of the Pawnbrokers' Act, 1872, carrying on business at Seven Sisters Road, Holloway, and his licence in respect of those premises was annually renewed until his death in July, 1882. After December 31, 1872, Creshull opened another business as a pawnbroker at 9, Woodberry Terrace, Stamford Hill, which business he carried on until his death, after which it was continued by his widow and executrix until December 7, 1882, when it was assigned by her to one George Pockett, who was a licensed pawnbroker within the meaning of s. 39, on December 31, 1872, before the Pawnbrokers' Act came into operation. In December, 1885, Pockett assigned the business at Woodberry Terrace to Ohlson, the prosecutor. Ohlson was not a licensed pawnbroker on December 31, 1872, but the licence for the business had been annually renewed to him by the Commissioners of Inland Revenue down to July, 1890, without the production by him of a certificate under the Pawnbrokers' Act, 1872. In July, 1890, the commissioners refused to renew the licence except upon the production of a magistrate's certificate under s. 39 of the Act. There was no suggestion that Ohlson was an unfit person to have a pawnbroker's licence, or that the premises were frequented by improper persons, the sole ground of the refusal being that the production of the certificate was a condition precedent to the grant of a licence.

From the affidavits filed in Garland's case it appeared that the

prosecutor, David Garland, in 1866 commenced business as a pawnbroker in Upper Kennington Lane in partnership with his brother, Robert John Garland, and that on December 31, 1872, he was a licensed pawnbroker within the meaning of s. 39 of the Pawnbrokers' Act, 1872. The licence for the business was granted to him and his brother, and had been annually renewed in their names down to the present time. The partnership between the prosecutor and his brother was dissolved in 1887, after which date the business belonged solely to his brother, and the prosecutor was not from that date until his present application the actual proprietor of any pawnbroker's business. In August, 1890, the prosecutor being desirous of opening a pawnbroker's business at Teddington, applied to the Commissioners of Inland Revenue for a licence, and tendered the duty, but the Commissioners refused to issue the licence except upon the production of a certificate; no allegation of unfitness was made against the prosecutor or the premises.

Sir E. Clarke, S.G., and *Danckwerts*, for the Commissioners, shewed cause. Ohlson was admittedly not a licensed pawnbroker at the time the Act of 1872 came into operation; neither is he the successor or assign of a licensed pawnbroker within the meaning of s. 39 of that Act. The exemption in s. 39 should be construed as having relation to the vested interest which the pawnbroker had in the business he was carrying on at the time the Act came into operation. It was then necessary for a pawnbroker, by virtue of 6 Geo. 4, c. 81, s. 10, to get a separate licence in respect of each set of premises upon which he carried on business, a provision continued by s. 37 of the Act of 1872; and it was this personal right which licensed pawnbrokers then had of carrying on their business at the places specified in their licences which was preserved to them, their executors, administrators, assigns, and successors by s. 39.

[CHARLES, J. If that is so, Creshull, though a licensed pawnbroker in December, 1872, would himself have required a certificate for this particular shop and for any new business which he might have opened after the Act came into operation.]

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Yes; the exception is purely personal, and is in protection of the business then being actually carried on.

[CHARLES, J. Before the Act of 1872 a pawnbroker could carry on business in any shop for which he got a licence; is not this the privilege which is preserved to the licensed pawnbroker?]

No; the privilege must be limited to the business he was then carrying on. A contrary interpretation would destroy the value of the Act, for any successor or assign of a pawnbroker licensed in December, 1872, might open as many new businesses as he pleased and transfer them to assignees, who in their turn could do the same, and so on ad infinitum, which would render wholly nugatory the requirement of a magistrate's certificate.

The same argument applies to the case of Garland. It is true that he was a licensed pawnbroker when the Act came into operation, but he is now seeking to open a new business on fresh premises in a different jurisdiction.

[The *Solicitor-General* also submitted that a mandamus would not lie to the commissioners as servants of the Crown, but for the purposes of the present case waived that objection in order to obtain a judicial decision upon the question at issue, following the precedent for that course in *Reg.* v. *Commissioners of Inland Revenue.* (1)]

Woolf, Q.C. (*Finlay, Q.C.* with him), for the prosecutors. If the contention of the commissioners is correct it will be necessary to read into the exemption in s. 39 the words "in respect of the shop in which he now carries on business," or equivalent words. There is no such limitation in the section, which confers an exemption upon persons "who at the commencement of the Act were licensed pawnbrokers, their successors and assigns," language which has a plain meaning. That section deals with the person only, while s. 37 deals with the place where the business is carried on. Applying the plain language of the exemption to the facts, Ohlson is the successor of Creshull, and also the direct assign of Pockett, both of whom were licensed pawnbrokers at the commencement of the Act. Garland's is an à fortiori case; he was, in fact, a licensed pawnbroker at the commencement of the Act, and it can hardly be seriously con-

(1) 21 Q. B. D. 569.

tended that, because he subsequently dissolved partnership and remained out of business for a time, he was not a licensed pawnbroker within the meaning of s. 39, when he was seeking to set up a new business.

The practice of the commissioners has for many years been to grant these licences without certificates. In *Reg.* v. *Bate*, a case decided in 1874 and discussed in Turner on the Pawnbrokers' Act, p. 141, the defendant, a licensed pawnbroker, applied for a license in respect of other premises, and upon the refusal of the commissioners to grant him a licence without a certificate opened the new business without a licence. For this he was prosecuted before Sir Thomas Henry, the chief magistrate, who dismissed the summons, deciding that "every pawnbroker in business before the Act was passed was entitled to open as many shops as he pleased on payment of the excise duty for each." The commissioners declined a case which Sir Henry offered to state, and have to the present time acquiesced in and acted upon his decision.

STEPHEN, J. The only question for our decision in the present case is the meaning of certain words in s. 39 of the Pawnbrokers' Act, 1872, and giving their plain grammatical meaning to those words our decision must be in favour of the prosecutor. If the contention of the Solicitor-General is right we must, in order to give effect to it, read into the section words restricting the right of a pawnbroker licensed at the commencement of the Act to obtain a licence without production of a certificate to the mere obtaining of a licence in respect of the business which at that time he was carrying on. What weighs very greatly with me in coming to the present conclusion is the practice of the Inland Revenue Commissioners for the past sixteen years. So long ago as the year 1874 this very point was decided by Sir Thomas Henry, for whose decisions we all have great respect, and the least that can be said with regard to the case before him is that it pointedly called the attention of the commissioners to the question, the learned magistrate having offered to state a case—an offer refused by the commissioners, who, by their refusal, must be taken to have acquiesced in the decision. That is a very

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strong contemporaneous exposition of the meaning of the Act. The result is, therefore, that in both these cases the order for a mandamus must be made absolute.

CHARLES, J. I am of the same opinion. The practice of the commissioners for the past sixteen years has been in accordance with the language of the Act of Parliament. The Solicitor-General asks us to read into s. 39 words restricting the privilege which, if those words are not read in, is undoubtedly conferred upon all pawnbrokers licensed at the commencement of the Act, their executors, administrators, assigns, and successors, and to hold that the exemption only extends to persons who were then carrying on business as licensed pawnbrokers in respect of the particular premises for which they were then actually licensed. I am unable to see any justification whatever for reading such words into the section, as it seems clear to me that the legislature intended to confer a general and not a restrictive privilege upon the licensed pawnbroker, his representatives and successors. In the present case Ohlson is the assign of Pockett and the successor of Creshull; Pockett and Creshull were both licensed pawnbrokers at the time of the passing of this statute, and in my judgment they were both entitled to the privilege of opening new premises with a new licence without the certificate prescribed by s. 39—a privilege which is to be enjoyed by their successors and assigns, and which is therefore enjoyed by Ohlson in the present case. As regards Garland, he was actually a licensed pawnbroker at the time of the passing of this statute, and he only asks now that, having then been a licensed pawnbroker, he may now have his licence without obtaining the statutory certificate, and it appears to me that he is clearly entitled to it. I agree that the order must be made absolute.

Order absolute for a mandamus.

Solicitors for the prosecutors: *J. & C. Attenborough.*
Solicitor for commissioners: *Solicitor of Inland Revenue.*

W. J. B.

SURMAN *v.* WHARTON.

1891
Jan. 13, 14.

Husband and Wife—Husband's Liability—Gift by Husband to Wife—Separate Estate—Contract binding Separate Property—Death of Wife—Devolution to Husband jure mariti—Legal Personal Representative—Extent of Liability—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 3, *s.* 23.

A husband by deed of gift settled leasehold property on his wife to her "own proper use and benefit," and the deed gave her "full power and authority to sue and give receipts." The husband died, and the wife married the defendant. After the commencement of the Married Women's Property Act, 1882, the wife borrowed money from the plaintiff. The wife died, and the defendant, without taking out administration, entered into possession of the property comprised in the deed of gift. The plaintiff sued the defendant to recover the money lent to the wife:—

Held, that the deed made the property comprised in it the wife's separate estate; that by s. 1, sub-s. 3 of the Married Women's Property Act, 1882, such property was bound by her contract when she borrowed the money; that on her death the property passed to the defendant jure mariti, and administration was unnecessary; that the defendant was the legal personal representative of his wife within the meaning of s. 23 of the Married Women's Property Act, 1882, and therefore subject to the same liabilities as she would be subject to if living, and was therefore liable, but only to the extent of the property which had been her separate estate.

Appeal by the plaintiff from the County Court of Warwickshire at Birmingham.

The action was brought to recover money lent by the plaintiff to the wife of the defendant, since deceased.

In the year 1862 the defendant's late wife married a man named Smith, who, after the marriage, by a deed of gift dated May 2, 1862, settled on his wife certain leasehold property which was subject to a mortgage. The deed settled the property on the wife to her "own proper use and benefit," and contained a clause conferring on her "full power and authority to sue and give receipts."

Smith died, and in 1872 his widow married a man named Harwood. Harwood died, and in 1881 the widow married the defendant Wharton.

After January 1, 1883, when the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into operation, Mrs. Wharton

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borrowed from the plaintiff the money to recover which this action was brought.

In 1889 Mrs. Wharton died intestate, and her husband the defendant, without taking out administration, entered into possession of the property comprised in the deed of gift.

The judge of the county court gave judgment for the defendant, and the plaintiff appealed.

Vachell, for the plaintiff. The property which was given to the wife by the deed of gift was given to her in such a way as to become her separate property; this is clear from the words of the deed. It is a question of intention, and in the case of a gift by husband to wife to hold that the property does not become separate estate is to make the deed a nullity. By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 3, her contract bound her separate property, to which on her death her husband became entitled jure mariti. He must take the burden with the benefit, and is therefore liable. He is subject to the same liabilities to which she would be subject if living, being her legal personal representative within the meaning of s. 23 of the Married Women's Property Act, 1882.

[CHARLES, J. "Legal personal representative" means, primâ facie, executor or administrator; but under some circumstances it may mean the person beneficially entitled.]

The present case is one in which it bears the latter meaning.

W. Graham, for the defendant. This property was granted by the deed subject to a mortgage, and if it is sought to charge the property, every person interested should be joined. The husband cannot be personally liable in respect of his wife's contract, which could only bind her separate property, and when by her death that property ceased to be her separate property the liability came to an end. The wife's leasehold vested in the husband without the necessity for administration: *In re Bellamy, Elder* v. *Pearson* (1), and it vested free from liability. If it did not so vest he is wrongly sued. The husband is not the legal personal representative within the meaning of s. 23.

[In addition to the cases referred to in the judgments the

(1) 25 Ch. D. 620.

following authorities were cited: 1 Williams on Executors, 8th ed., p. 416; Story's Equity Jurisprudence, s. 1383; *Hulme* v. *Tenant* (1); *Hartley* v. *Hurle* (2); *Tyler* v. *Lake* (3); *Tullett* v. *Armstrong* (4); *Blacklow* v. *Laws* (5).]

POLLOCK, B. The first question is whether this leasehold property, which was given to Mrs. Smith, afterwards Mrs. Wharton, by the deed of gift, became her separate estate. In order to decide this, it is not necessary to go into the authorities, for the point turns on the words of the deed, by which Smith, after his marriage, gave the leasehold property in question to his wife to her "own proper use and benefit." Whatever might be the effect of those words if the grantor were a stranger, there can be no doubt that where he was the husband of the grantee the effect was to make the property her separate estate. But it does not stop there, for the deed conferred on her "full power and authority to sue and give receipts." In *Lee* v. *Prieaux* (6), it was held that a legacy to a married woman, "her receipt to be a sufficient discharge to the executors," was equivalent with saying "to her sole and separate use," and it is clear on the authority of that case that the leasehold property, the subject of this deed of gift, became separate property. The next question is, What is the result of the death of the wife? It is suggested that by virtue of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the jus mariti ceased, and the husband must take out administration to his wife in order to be entitled. But in *In re Lambert's Estate, Stanton* v. *Lambert* (7), Stirling, J., held that the Married Women's Property Act did not alter the course of devolution, but that on the wife's death her separate property came to her husband jure mariti. But now comes the real difficulty in the case. Mr. Graham contends that this property came to the defendant clear of debt. It appears that the attention of the county court judge was not called to s. 23 of the Married Women's Property Act. That section provides that, "For the purposes of this Act the legal personal representative of any

(1) 1 Bro. C. C. 16; 1 W. & T. 6th ed. 536.
(2) 5 Ves. 540.
(3) 2 Russ. & My. 183.
(4) 1 Beav. 1.
(5) 2 Hare, 40.
(6) 3 Bro. C. C. 381.
(7) 39 Ch. D. 626.

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married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." Our attention has also been called to s. 1, sub-s. 3, of the same Act, by which "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shewn." The cases decide that this provision does not place a married woman exactly in the same position as if she were unmarried, for her contract binds only her separate property. Then what is the result if she dies? It is clear from s. 23, that in that case her legal personal representative has the same liabilities as she would have if living. The only question, therefore, is whether her husband is her legal personal representative, and, reading the two sections to which I have referred together, I have no difficulty in holding that he is. Even in the case of a will, if it is obvious that such was the intention of the testator, the legal personal representative may be the person beneficially entitled. I have therefore no doubt that the effect of the two sections is that the defendant is liable. Then how far is he liable? He can only be made liable as to that which was his wife's separate property, and judgment must be given against him to the same extent as it would have been given against her if she had been alive.

CHARLES, J. I am of the same opinion. The first question is whether this leasehold property was the separate property of the wife. That depends on the terms of the deed, and, looking at the whole language of the deed, I have no doubt that the effect was to make this property her separate estate, and there is nothing in any of the authorities to shew the contrary. Then by s. 1, sub-s. 3, of the Married Women's Property Act, 1882, the property was bound by her contract. She died leaving no will, and her husband took possession of the property in question, but did not take out administration. I think he acted within his rights in so doing; for where a wife dies entitled to leasehold property in possession, that and her other chattel interests pass to her husband jure mariti, and there is no need of administration. The county court judge has held that the husband took the pro-

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perty free from this liability. I cannot agree with that view. I do not think the question of liability under s. 23 was much considered. It is urged that the husband is not the legal personal representative of his wife; but I think that view is too narrow. Apart from the question of the construction of the statute, although, primâ facie, legal personal representative means executor or administrator, it may under certain circumstances mean the person beneficially entitled. In *Cotton* v. *Cotton* (1), Lord Langdale, M.R., held that legal personal representatives meant the persons beneficially entitled—in that case the next of kin according to the Statute of Distributions. Other cases also lay down the same broad rule of construction in the case of a will; and I do not see why in the case of a statute we should adopt a narrower construction. Sect. 1, sub-s. 3, provides that a married woman's separate property shall be bound by her contracts, and therefore s. 23 applies where the husband takes the property jure mariti. He takes in his own right, but still he takes as legal personal representative, as was the case in *Cotton* v. *Cotton* (1), where the expression "legal personal representatives" was held to mean next of kin. The defendant is by law entitled to claim beneficially, and by s. 1, sub-s. 3, the property which he is so entitled to claim is bound by his wife's contract. Therefore, judgment ought to be given against the defendant; but it must be framed so as to correspond (with the necessary modifications) with the form settled in *Scott* v. *Morley* (2), for he can only be made liable in respect of such property as would be his wife's separate estate if she were living.

Appeal allowed.

Solicitor for plaintiff: *Edwin Docker, Birmingham.*

Solicitors for defendant: *Gamlen & Burdett, for Cottrell & Son, Birmingham.*

(1) 2 Beav. 67.

(2) 20 Q. B. D. 120, 132.

P. B. H.

1891
Jan. 30.

BRACE *v.* ABERCARN COLLIERY COMPANY.
HUGGINS *v.* LONDON AND SOUTH WALES COLLIERY COMPANY.

Mine—Wages—Payment by Weight of Mineral—"Actual Weight gotten of Mineral contracted to be gotten"—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 12, *sub-s.* 1—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.

By sub-s. 1, s. 12, of the Coal Mines Regulation Act, 1887: "When the amount of wages paid to any of the persons employed in a mine depends on the amount of minerals gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . . provided that nothing in the section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that reductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten."

The plaintiffs were employed in the defendants' collieries to cut large coal at wages which depended on the weight gotten. The coal raised was screened at the pit's mouth, and the defendants made deductions from the plaintiffs' wages in respect of the small coal which it was found to contain. The plaintiffs sued the defendants for the amounts so deducted:—

Held, that the case of *Nethersead Colliery Co.* v. *Bourne* (14 App. Cas. 228), under the Coal Mines Regulation Act, 1872, applied, that the deductions were illegal under s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887, and that the plaintiffs were therefore entitled to recover.

Appeals of the defendants from decisions of the county court judge for Monmouthshire in favour of the claims of the plaintiffs, miners employed in the defendants' collieries, to recover respectively 1*l.* 9*s.* 6*d.* and 1*l.* 11*s.* 4*d.* for small coal gotten between February 7 and April 5, 1890, such sums having been deducted from the plaintiffs' wages, contrary, as they alleged, to sub-s. 1, s. 12, of the Coal Mines Regulation Act, 1887.

It appeared that at the time when the deductions were made the plaintiffs were employed under oral contracts at wages regulated pursuant to a "sliding scale" agreed upon by the Monmouth and South Wales Collieries Association—a body consisting of representatives of employers and workmen in the district. The plaintiffs were paid for cutting large coal at 1*s.* 6*d.* per ton, with an addition of 32½ per cent. as fixed by the "sliding scale," but were not paid for small coal. During February,

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1890, the workmen at both collieries claimed payment for small coal; but this was refused by the defendants. The mode of weighing the coal and making a deduction in respect of small coal was the same at the two collieries. The coal, when cut, was put by the workman into iron boxes, and these when full were emptied by him into a truck on which he chalked his number. The truck, on being raised to the pit's mouth, was weighed by the employers' weigher, and the weight so taken was checked by the workmen's check-weigher. The truck was then tipped on to a sloping screen, forming part of a machine known as "Billy Fairplay." The large coal which passed over the screen fell into railway trucks; the small coal which passed through the screen fell into a box and was weighed automatically, the weight being shewn upon a dial and being taken down by a boy in the service of the employers. On Saturday the boy's book was given to the weigher; he and the check-weigher deducted from the gross amount of coal in each truck the amount of small coal shewn by the book; and the workman was paid upon the net weight, after allowing for this deduction. The average weight of coal in each truck as weighed by the weigher was 22 cwt. The average weight of small coal, as shewn by the dial on "Billy Fairplay," was $2\frac{3}{4}$ per cent. The small coal was produced in the processes of filling the boxes, loading the truck, and tipping the coal on to the screen.

The judge held that the case was governed by *Bourne* v. *Netherseal Colliery Co.* (1) The sums allowed were at the same rate as that paid for large coal.

Sir R. E. Webster, A.G. (with him, *A. T. Lawrence*), for the defendants. The defendants are entitled to judgment. The case depends on the true construction of sub-s. 1, s. 12, of the Coal Mines Regulation Act, 1887. (2) This sub-section is substituted for that part of s. 17 of the Coal Mines Regulation Act, 1872 (2)

(1) 19 Q. B. D. 357; 20 Q. B. D. 606; 14 App. Cas. 228.

(2) By the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12, sub-s. 1: "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them

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on which the decision of the House of Lords in *Netherseal Colliery Co.* v. *Bourne* (1) was given. It is submitted that the effect of the alteration is to render the deductions made from the plaintiffs' wages in respect of the small coal raised by them legal, having regard to the nature of the contract under which they were working.

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of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable:

"Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral, or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any check-weigher is stationed for this purpose as hereinafter mentioned) by such person and such check-weigher; or, in case of difference, by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other; or, in default of agreement, appointed by a chairman of a court of quarter sessions within the jurisdiction of which any shaft of the mine is situate."

By the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 17: "Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends on the amount of mineral gotten by them, such persons shall, after the first day of August, one thousand eight hundred and seventy-three, unless the mine is exempted by a Secretary of State, be paid according to the weight of the mineral gotten by them, and such mineral shall be duly weighed accordingly:

"Provided always, that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral, or his drawer, or by the person immediately employed by him, such deductions being determined by the banksman or weigher and check-weigher (if there be one), or, in case of difference, by a third party to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other."

(1) 14 App. Cas. 228.

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By s. 17 of the Act of 1872, where the wages of the workman depend "on the amount of mineral gotten," he is to be paid "according to the weight of the mineral gotten"; but by sub-s. 1, s. 12, of the Act of 1887, he is to be paid "according to the actual weight gotten of the mineral contracted to be gotten." In *Netherseal Colliery Co.* v. *Bourne* (1), it was held in the House of Lords, that slack raised under the same circumstances, and separated by the same process as the small coal in this case, was "mineral gotten" within the meaning of the former Act, and that deductions in respect of it were therefore illegal. But here the small coal is not "mineral contracted to be gotten" within the meaning of the latter Act, and for this reason the weight of the small coal may be deducted by the employer in his computation of "the actual weight gotten of the mineral contracted to be gotten" in respect of which he is liable under the statute. The evidence shews that there was no contract between the plaintiffs and the defendants as to the raising of the small coal. It was proved that wages were regulated at the collieries by the "sliding scale," and that this was based upon "the average net selling price for large colliery screened coal delivered f. o. b." at certain places. No allowance for small coal was made in the pay-sheets, and the screening machine was used expressly for the purpose of separating the large coal, "the mineral contracted to be gotten," from the small coal, with respect to which there was no contract, and which was treated as a waste product.

In any case only a quantum meruit can be due to the plaintiffs in respect of the small coal.

Abel Thomas, for the plaintiffs, was not heard.

POLLOCK, B. I am of opinion that the decisions of the county court judge were correct. It is admitted that if the actions had been brought before the passing of the Coal Mines Regulation Act, 1887, the matter would have been concluded in the plaintiffs' favour by the case of *Bourne* v. *Netherseal Colliery Co.* (2), in which the question raised was dealt with in the clearest

(1) 14 App. Cas. 228. (2) 20 Q. B. D. 606; 14 App. Cas. 228.

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manner in the Court of Appeal by the Master of the Rolls and Lopes, L.J., and in the House of Lords by the Lord Chancellor, Lord Herschell, and Lord Macnaghten. What has now to be considered is whether that case can be distinguished from the present, having regard to the change of language in s. 12, sub-s. 1, of the new Act. The Act had passed at the time when the case was before the House of Lords, but it is nowhere suggested in the judgments that the change made any difference in favour of persons in the defendants' position.

The object of both Acts is the same—the protection of miners against unfair deduction from their wages; the only difference being that by s. 17 of the Act of 1872 the miner is to be paid "according to the weight of mineral gotten," whereas by s. 12, sub-s. 1, of the Act of 1887, he is to be paid "according to the actual weight gotten of the mineral contracted to be gotten." The latter section enacts that he shall be so paid, subject to the provision that nothing in it "shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten." In my opinion, it is not difficult to give effect to this language. The Act applies (s. 3) to "mines of coal, mines of stratified ironstone, mines of shale, and mines of fire-clay." It is well known that in the case of ironstone a great deal comes to the surface which can only be severed from the valuable portion in the furnace, and that in excavating coal it is at times impossible to avoid bringing shale, or slate, or other inferior substances to the pit's mouth. These provisions appear to me, in the case of a coal mine, to protect the masters by enabling them to make deductions from wages in respect of these inferior substances, and to protect the workmen by rendering deductions from wages in respect of small coal and coal-dust illegal. The words "Substances other than the mineral contracted to be gotten," in the case of a coal mine, plainly, in my opinion, mean substances other than coal. The Attorney General was driven to argue that if there was a contract between a master and workmen for cutting large lumps of coal, the new Act would sanction deductions for small

lumps. I think this construction would defeat the object of the new Act, and I come to this conclusion with the more confidence, because of the language of the learned Lords in their judgments in *Bourne* v. *Netherseal Colliery Co.* (1), which seems to have as much application to the new Act as to the old. The Lord Chancellor held that "the mineral contracted to be gotten" meant coal, whether slack or large coal. Lord Herschell said, "What was the 'mineral contracted to be gotten'? I think the answer must be 'coal'; not large pieces of coal only, but all the coal, whether large or small, which necessarily arose from the operation of getting the produce of the mine. The whole of that substance which unavoidably, or in the ordinary course of working, found its way into the tubs, and so to the pit's bank, was, in my opinion, mineral contracted to be gotten." Lord Macnaghten says: "I cannot doubt that coal is coal, whether it be 'round coal or slack.'" So here coal is coal, whether it is in large or small pieces. He further says: "Parliament would legislate to little purpose if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own. People cannot escape from the obligation of a statute by putting a private interpretation upon its language." So here, if the contention of the defendants is right, they are entitled to say that, notwithstanding s. 12, sub-s. 1, of the Mines Regulation Act, 1887, they have contracted with their workmen only to pay them for large coal—in other words, they are entitled so far to repeal the statute. The appeals must therefore be dismissed.

As regards the amount recoverable, the county court judge has held that the plaintiffs are entitled to be paid for the small coal at the same rate as that fixed by the contract for the large coal, on the ground that the one was originally part of the other, and I agree with him. It seems to me to follow almost as a corollary from the judgments of the House of Lords in *Bourne* v. *Netherseal Colliery Co.* (1) that this is the correct view.

CHARLES, J. I am of the same opinion. In the case of *Bourne* v. *Netherseal Colliery Co.* (1), a majority of the judges in

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

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the Court of Appeal, and a majority of the learned Lords in the House of Lords, placed a judicial interpretation upon the words, "the mineral contracted to be gotten," in s. 17 of the Coal Mines Regulation Act, 1872. It was there suggested that, in the case of a coal mine, the words did not necessarily mean coal in a general sense, but might mean the particular kind of coal which was to be raised under some particular contract. This argument was considered by Lord Herschell and Lord Macnaghten in their judgments in the House of Lords, and was rejected by them, Lord Herschell saying: "Certainly it is difficult to see how the slack, which, beyond question, was part of the mineral contracted to be gotten when it formed part of the large pieces of coal, ceased to be mineral contracted to be gotten because it was afterwards crushed or shaken into small pieces." The argument for the defendants turned on the difference between the language of s. 17 of the Coal Mines Regulation Act, 1872, and that of s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887. The difference is, that by the former the miner, whose wages depend on the weight of mineral gotten, is to be paid "according to the weight of mineral gotten"; whereas, by the latter, he is to be paid "according to the actual weight gotten of the mineral contracted to be gotten." It was said that, because of the insertion of these new words, the decision in *Bourne* v. *Netherseal Colliery Co.* (1) did not apply, and that we ought to hold that, under the new Act, the defendants might legally pay the plaintiffs upon the weight of the large coal after the small coal had been deducted from it. I cannot accede to this argument, having regard to the meaning of the words "mineral contracted to be gotten," in the earlier statute, as declared by the House of Lords. I think the additional words leave the matter precisely as it stood before. The addition may be explained—if an explanation be requisite—by supposing that the draftsman placed the expression, "the mineral contracted to be gotten," which occurs several times in both Acts, in both parts of s. 12, sub-s. 1, of the later Act, for the sake of uniformity. I agree with my learned brother that the words "stones or substances other than the mineral contracted to be gotten," in the other part of this sub-section, mean in the

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

case of a coal mine stones and substances other than coal, in the wide and general sense of the term.

Appeals dismissed.

Solicitors for plaintiffs: *Wrentmore & Son, for Morgan & Rhys, Pontypridd.*

Solicitors for defendants: *Ullithorne, Currey, & Villiers, for Simons & Plews, Merthyr Tydvil.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.

Jan. 27.

CRUMBIE *v.* WALLSEND LOCAL BOARD.

Limitations, Statute of—Cause of Action, Accrual of—Subsidence caused by Excavation—Continuous Subsidence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 264.

By the Public Health Act, 1875, s. 264, an action against a local authority for anything done or intended to be done or omitted to be done under the Act must be commenced within six months next after the accruing of the cause of action.

Where an excavation made by a local authority under a street, for the purpose of laying a sewer, was not properly filled in, and in consequence subsidence of the plaintiff's land with injury to houses thereon took place, which began at a period more than six months before, and went on continuously down to the commencement of an action by the plaintiff in respect of such subsidence:—

Held, on the authority of *Darley Main Colliery Co.* v. *Mitchell* (11 App. Cas. 127), that the further subsidence, which took place within the six months before action, constituted a distinct cause of action, in respect of which the action was maintainable notwithstanding the above-mentioned enactment.

MOTION by defendants to set aside judgment entered for the plaintiff and to enter judgment for themselves, notwithstanding the findings of the jury, or for a new trial, on the ground that there was no evidence to support the verdict, and that on the facts proved the judge should have entered judgment for the defendants.

The action was for damage to houses belonging to the plaintiff through subsidence caused by the improper construction of a sewer by the defendants, the date of the writ being August 1, 1889. The defendants pleaded (inter alia) the 264th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which provides that an action against a local authority for anything done or

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intended to be done under the Act must be commenced within six months next after the accruing of the cause of action.

At the trial before Wills, J., with a jury, the effect of the evidence given for the plaintiff appeared to be in substance as follows. The plaintiff's houses stood by the side of a street within the defendants' district, the foundation of the front wall resting on soft and sandy soil with which an old ditch or water-course had been filled in, and which was full of moisture. The course of the old ditch crossed the line of the street. The defendants, for the purpose of making a sewer under the street, excavated a trench, which cut through the old ditch. The trench was not properly filled in with puddled material after the sewer was laid. The result was that the oozy soil in what had been the old ditch kept flowing from under the foundation of plaintiff's houses into the trench; and, by reason of the consequent withdrawal of support, subsidence of the surface of the plaintiff's land went on taking place, by which the plaintiff's houses were damaged. The sewer was completed in 1885. In March, 1886, some subsidence had occurred by which cracks in the walls of plaintiff's houses and other damage were caused. The process of subsidence subsequently continued, and the cracks in the walls and other damage had increased since February 1, 1889. The jury found as the result of the plaintiff's evidence, in answer to questions put to them by the learned judge, that there had been fresh removals of soil (1) and subsidences beneath the plaintiff's property between February 1, 1889 and August 1, 1889, the date of the writ; and that there were fresh subsidences of soil beneath the plaintiff's property within that period apart from fresh removals of soil. It was suggested by the learned judge and acquiesced in by the parties, to prevent further litigation, that, subject to the question as to liability on the part of the defendants, the damages should be assessed by the jury on the footing that they should include all damage, both actual and prospective, i.e., which had accrued or would accrue, exclusive of damage by subsidence before February 1, 1889. A witness, who

(1) This appeared to mean fresh removals by the escape of the soil into the trench as above described, as there was no suggestion of any fresh operations by the defendants.

was a builder and contractor, called for the plaintiff as an expert, after giving evidence as to the cause of subsidence to the effect above mentioned, stated that, in his opinion, the mischief was continuing, and that it was necessary, in order to prevent further mischief and to save the plaintiff's premises from coming down, to carry the front wall below the level of the old ditch. He gave an estimate of the damage by subsidence subsequent to February 1, 1889, both actual and prospective, on that footing. He stated, however, in cross-examination, with regard to extra damage that had accrued after February 1, 1889, that he could not distinguish with scientific accuracy between the amount of the damage which had accrued before and that which had accrued after that date—that he could not make a division of it as regards pointing up cracks, and so forth, as a small crack took as much pointing up as a large one—and that the only mode by which he arrived at the amount of such damage was by dividing the total amount of damage that had accrued between the two periods. (1) It was contended for the defendants, as will be seen, in argument, that the effect of his evidence and the evidence for the plaintiff generally was to shew that the subsidence was of a continuously progressive character from the commencement. The jury found a verdict for 150*l.* damages in respect of subsidence after February 1, 1889, and the learned judge gave judgment for the plaintiff for that amount.

J. Lawson Walton, Q.C., and *H. Newson*, for the defendants. No fresh cause of action accrued in this case within six months before the date of the writ. The further damage during that period did not constitute a fresh cause of action. In *Darley Main Colliery Co.* v. *Mitchell* (2) the House of Lords no doubt held that, where there was a wholly distinct and independent subsidence after a long interval, that constituted a fresh cause of action. Here the evidence shewed that the subsidence was

(1) The particulars of this evidence are only material in so far as it was attempted to found an argument upon it with regard to the question, whether the defendants' liability was barred under the 264th section of the Public Health Act, 1875. It will be observed that, apart from that, no question was raised as to measure or amount of damages.

(2) 11 App. Cas. 127.

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continuous all through, and that the process must continue. The question is, when the statutory limit applies where a thing is done which causes continuing damage. There is nothing in the decision of the House of Lords inconsistent with the view that in such a case, as soon as subsidence occurs and damage is caused, the plaintiff can sue and recover all the damage that has occurred and must occur from what has been done by the defendants. The mischief here was really caused by the tapping of the spongy sub-soil, by which a necessarily progressive process of subsidence was set up. That mischief existed in 1886, and it is contended that in such a case as this an action might then have been brought and all the damage recovered. It was stated by the plaintiff's own expert witness that the mischief was continuing, and that the only remedy was to carry the plaintiff's wall below the old ditch, which, obviously, if done in 1886, would have prevented all further mischief; and he admitted that it was impossible really to distinguish between the damage which accrued before and that which accrued after February 1, 1889. It is submitted that in a case like this, notwithstanding the decision in *Darley Main Colliery Co.* v. *Mitchell* (1), the expense of carrying down the wall below the old ditch and all the other damage might have been given by a jury as damages in an action brought in 1886.

[LORD ESHER, M.R. How could it be known or proved that the process of subsidence had been continuous, or whether at any stage it would continue or had come to an end? It must be mere matter of opinion on the part of the witness.]

It might be a reasonably clear inference from the state of things existing. It is submitted, therefore, that the plaintiff's evidence shews that the damages now recovered might all have been recovered in 1886. Assuming that further pecuniary damage has been actually occasioned since February 1, 1889, then, if the plaintiff could have recovered in 1886, as it is submitted that he could, a sum that would have enabled him to prevent the further mischief which must ensue, he cannot by delaying to bring his action be entitled to recover in respect of further damage which has accrued since. None of the cases

(1) 11 App. Cas. 127.

decide that, where the subsidence is continuous, and it is impossible really to distinguish between the damage at one period and another, there is a fresh cause of action in respect of the subsidence after a certain date. It is quite different where, as in *Darley Main Colliery Co.* v. *Mitchell* (1), an entirely distinct and independent subsidence subsequently occurs, which could not have been at all foreseen or provided for, and which the plaintiff therefore could not have been put in a position to prevent, on the assessment of damages upon the occasion of the previous subsidence.

[BOWEN, L.J. If, as the House of Lords held, the damage by subsidence gives rise to the cause of action, then must not fresh damage of the same kind be a fresh cause of action? The damage of yesterday is not the damage of the day before. So, if there be damage by fresh subsidence yesterday, which did not exist the day before, must it not be a fresh cause of action?]

There are expressions in the judgment of the Master of the Rolls in *Darley Main Colliery Co.* v. *Mitchell*, in this Court (2) and in that of Lord Bramwell in the House of Lords (3) which shew that the case there in contemplation was one in which the subsidence occurs by fits and starts, where there are successive independent subsidences, not the case where it is all one continuous process, as it was here.

The object of the legislature in passing the 264th section was to protect local authorities from claims in respect of things done more than six months back. Here the real mischief was the tapping of the sandy sub-soil, and drainage into the old ditch thereby set up, which took place in 1886.

[FRY, L.J. Having regard to the terms of the section, the sole question with which we have to deal must be whether the cause of action accrued within six months before action brought.]

[They also cited *Lamb* v. *Walker*. (4)]

Waddy, Q.C., and *H. Manisty*, for the plaintiff, were not called upon.

(1) 11 App. Cas. 127.
(2) 14 Q. B. D. 125, at pp. 131, 133.
(3) 11 App. Cas. 127, at pp. 145, 146.
(4) 3 Q. B. D. 389.

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LORD ESHER, M.R. It is unnecessary to go through all the cases, for the decision of the House of Lords in *Darley Main Colliery Co.* v. *Mitchell* (1) has settled the law on the subject. The only distinction that upon the facts could be suggested between that case and this is that there the subsidence is said to have occurred by fits and starts, whereas in this case it is alleged to have gone on continuously. I do not believe that was, or could be, proved to have been the case, but I will assume that it was so. The decision of the House of Lords was to the effect that an action cannot be brought for the excavation, but a cause of action arises when damage to the plaintiff's property results therefrom by subsidence. Therefore, there is no cause of action for any such damage to the plaintiff's property until it has occurred. When a certain amount of such damage has occurred, there is only a cause of action in respect of that amount. Afterwards, other damage may occur—that is to say, more of such damage may occur. There is no cause of action in respect of such further damage until it has occurred. The House of Lords held, that, where there are in such a case successive damages, a fresh cause of action arises in respect of each successive damage. That is a plain rule, and the suggested distinction is too fine for me. I think, therefore, that this application should be refused.

BOWEN, L.J., and FRY, L.J., concurred.

Application refused.

Solicitors for plaintiff: *Rowcliffes, Rawle, & Co., for Newlands & Newlands.*

Solicitors for defendants: *J. E. & H. Scott, for Daglish & Mulcaster.*

(1) 11 App. Cas. 127.

E. L.

BEASLEY *v.* RONEY.

1891
Feb. 4.

Husband and Wife—Separate Property—Action for Tort to Wife—Joinder of Husband as co-Plaintiff—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2, *s.* 5.

In an action brought by a husband and wife as co-plaintiffs in respect of personal injuries to the wife, the jury awarded damages to the wife and a sum to the husband for expenses, and the whole amount recovered was paid into the hands of their solicitor:—

Held, that the amount awarded to the wife was her separate property within the meaning of s. 5 of the Married Women's Property Act, 1882, and that therefore a garnishee order attaching the whole of the money in the hands of the solicitor to answer a judgment debt of the husband was invalid.

APPEAL of defendant from a judgment of the judge of the Westminster County Court in favour of the plaintiff in an interpleader issue sent down for trial from the High Court. The material facts were as follows:—

The plaintiff, Beasley, was a judgment creditor of the husband of the defendant, Mrs. Roney, upon a judgment obtained in 1888. In January, 1890, Mr. and Mrs. Roney, who were the plaintiffs in an action against the London General Omnibus Company to recover damages for personal injuries to the wife, obtained a verdict for 71*l.* 6*s.* 6*d.*, of which 25*l.* was awarded to the wife in respect of her personal injuries, and 46*l.* 6*s.* 6*d.* to the husband for expenses, and the amount of the verdict and the taxed costs was in due course paid into the hands of their solicitor. Mr. and Mrs. Roney had their solicitor's bill of costs taxed, and upon taxation it was found that 47*l.* 14*s.* 2*d.* was due to them from the solicitor.

Beasley, as a judgment creditor of the husband, obtained a garnishee order nisi, charging this money in the hands of the solicitor, and the wife having claimed that 25*l.* out of the amount belonged to her, an interpleader issue was directed, in which Beasley was made the plaintiff and Mrs. Roney the defendant, and in which Beasley affirmed and Mrs. Roney denied that he was entitled to the whole sum. The money was paid into Court by the solicitor to await the result. The county court judge

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found in favour of the plaintiff, the judgment creditor, and Mrs. Roney appealed.

Muir Mackenzie, for the defendant. The 25*l.* recovered as damages for the personal injuries was the wife's money, and cannot be attached to satisfy the husband's debts; if it were paid into the husband's hands, he would be a trustee of the amount for his wife. In garnishee proceedings equitable as well as legal rights must be considered, and the only attachable debt is money which the judgment debtor could honestly deal with without affecting the rights of others: *In re General Horticultural Co., Ex parte Whitehouse* (1). In the present case the husband could not have dealt with the whole of the money without violating the equitable rights of his wife. To support the decision of the county court judge the judgment must have been solely the husband's judgment. But the husband was not merely joined for conformity; he was a co-plaintiff with different rights and interest from those of his wife, who was equally a plaintiff with him. The judgment was therefore not the husband's only, but was the joint judgment of husband and wife, and a debt due to a judgment debtor jointly with another person cannot be attached: *Macdonald* v. *Tacquah Gold Mines Co.* (2)

[CHARLES, J. Your position is, that it is either a joint judgment, and therefore the amount cannot be attached, or it is the husband's judgment, in which case he is a trustee in equity for his wife.]

Wildey Wright, for the plaintiff. It is admitted that a debt due to two persons jointly cannot be attached; but in the present case the money recovered in the action belonged to the husband. The verdict was general, and there was no evidence of allocation of any part of the sum recovered to the wife.

[POLLOCK, B. We must take it as a fact, whatever the mere form of the judgment, that the jury did award 25*l.* to the wife.]

Even if that be so, the money is still the husband's. Before the Married Women's Property Acts, the wife could have brought no action in her own name without joining her husband, and the husband alone would have been entitled to the fruits of the

(1) 32 Ch. D. 512. (2) 13 Q. B. D. 535.

judgment. The capacity of a wife to sue in her own name in respect of a tort without joining her husband depends on s. 1, sub-s. 2, of the Married Women's Property Act, 1882, which, after providing that the husband need not be joined with her as plaintiff in any action brought by her, enacts that the damages or costs recovered by her "in any such action" shall be her separate property. The word "such" limits and defines the class of actions in which the wife gets the amount recovered as her separate property; it is only in cases where she avails herself of her newly-acquired privilege of bringing an action in her own name without joining her husband; if she joins him, the amount recovered is still, as under the old law, her husband's property.

[CHARLES, J. Is not this money "property acquired" by the wife within s. 5 of the Act of 1882?]

No; the expression "money acquired" by her does not include damages recovered in an action.

Muir Mackenzie, in reply.

POLLOCK, B. I am of opinion that judgment ought to be entered in favour of the defendant, and that this appeal must be allowed. The material facts are few. There was a verdict for 71*l.* 6*s.* 6*d.* in an action, as to which all we know is that it was an action for negligence brought by the present defendant Mrs. Roney and her husband against the London General Omnibus Company. Of the amount so recovered, the solicitor engaged in that action retained in his hands 47*l.* 14*s.* 2*d.*, and it is clear that this amount was due from him to one or both of the plaintiffs. It is clear also that the damages sustained by the wife were assessed by the jury at 25*l.*, and that the jury gave the husband, speaking roughly, 46*l.* to recoup him for moneys expended. Under the interpleader issue, the question for decision was whether the garnishee was to pay the whole amount to the present plaintiff, who was a judgment creditor of the husband, and that involved the question whether the amount recovered from the omnibus company was divisible. The county court judge held that it was not, for there was nothing to shew that the whole of the money had not been received for the benefit of the male plaintiff, so as to become his moneys. If this was a

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joint debt, owing to the husband and wife jointly, *Macdonald* v. *Tacquah Gold Mines Company* (1) is against the present plaintiff; that case is a distinct authority to shew that the debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to the judgment debtor alone, and that where it is only due to him jointly with another it cannot be attached. But the question arises in the present case whether the wife has a separate right to the damages which she recovered. Viewed in the light of the spirit of recent legislation, she is so entitled, and in my judgment the 25*l.* is hers, and cannot be attached to satisfy a debt owing by her husband. The language of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, may admit of some doubt; but the case is clearly within s. 5, by which every woman married before the commencement of the Act is entitled to have, and to hold, and to dispose of as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act. I can entertain no doubt that this section applies to money recovered by the verdict of a jury; it is property acquired by her to which she is as much entitled as if she were an independent person altogether. I think there is no difference between the position of the husband and wife in the present case and the position of two persons who, being injured by a common accident, bring a common action in respect of it, each of whom would be entitled to the damages awarded to him in the action.

CHARLES, J. I am of the same opinion. The only way in which the case of the plaintiff can be successfully argued is by saying that the judgment, though professedly joint, is really the husband's. It is either a joint judgment, in which case the amount of the judgment cannot be attached, or else it is the judgment of the husband. Let us assume it to be the husband's judgment: the husband is in that case the trustee of 25*l.* of the amount for the benefit of his wife. It is suggested that the Married Women's Property Act has nothing to do with the case,

(1) 13 Q. B. D. 535.

because the husband was in fact joined as a plaintiff; but on this point I think that the remarks of my brother Pollock are well founded. Speaking for myself, I do not think that s. 1, sub-s. 2, is necessarily confined to actions brought solely by the wife; and, even where in the same writ the husband is joined as a party, the money recovered by the wife may, I think, be her separate property within the meaning of that section. As to the construction of s. 5, I entirely agree with the observations of my brother Pollock. For these reasons I am of opinion that the order of the county court judge cannot be sustained.

Appeal allowed.

Solicitors for plaintiff: *Holder & Wood.*

Solicitors for defendant: *Houseman & Co.*

W. J. B.

SELIG *v.* LION.

Jan. 23.

Practice—Stay of Proceedings—Bankruptcy of Plaintiff—Election of Trustee in Bankruptcy not to proceed with Action—Discharge of Plaintiff—Assignment of Cause of Action by Trustee to Plaintiff—Power to remove Stay of Proceedings.

The plaintiff in an action became bankrupt; the defendant applied to the trustee in the bankruptcy to know whether he would continue the proceedings in the action; the trustee having replied that he did not see his way to continue them, the defendant obtained an unconditional order in chambers for a stay of proceedings; notice of this application was given to the trustee, who took no part in the proceedings. Subsequently the plaintiff, having obtained his discharge, purchased from the trustee all the assets in the bankruptcy, and applied in chambers to have the stay of proceedings removed:—

Held, that the plaintiff was in the same position as the trustee in bankruptcy, who in the absence of special circumstances would not have been entitled to have the stay of proceedings removed, and that the mere assignment of the cause of action by the trustee to the plaintiff was not a special circumstance entitling him to a removal of the stay of proceedings.

APPEAL from a decision of Day, J., at chambers, refusing to remove a stay of proceedings.

The action, which was brought to recover commission, proceeded regularly down to notice of trial, which was given in July, 1887; shortly afterwards the plaintiff became bankrupt. The defendant's solicitor thereupon wrote to the trustee in

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bankruptcy asking him if he intended to continue the action; to which the trustee replied that he did not see his way to continue it. In November, 1887, the defendant obtained an order from a master in chambers for a stay of proceedings, which, upon the plaintiff appealing, was affirmed by a judge; notice of the application for the stay was given to the trustee, but he took no part in the proceedings. In March, 1889, the plaintiff obtained his discharge, and in June, 1889, he purchased from the trustee all the assets in the bankruptcy. Subsequently the plaintiff, being desirous of proceeding with the action, applied in chambers for an order removing the stay of proceedings, which was refused by Day, J. The plaintiff appealed.

Haldinstein, for the plaintiff. The action did not abate by reason of the bankruptcy: *Barker* v. *Johnson* (1); and the cause of action still survived to the trustee notwithstanding the stay of proceedings. The plaintiff, as assignee of the assets of the bankruptcy, has all the rights which belonged to his trustee, and is entitled to a removal of the stay to enable him to proceed with the action. [He also cited *Jackson* v. *North Eastern Ry. Co.* (2); *Warder* v. *Saunders.* (3)]

G. E. Lyon, for the defendant, was not called upon.

WILLS, J. I am of opinion that this appeal must be dismissed. I do not see any way in which we can help the plaintiff. The cause of action which was vested in the bankrupt passed for all effective purposes to the trustee in bankruptcy; I do not discuss the precise condition in which the cause of action then was, but the control over it had passed to the trustee. Now the trustee elected not to avail himself of the benefit of the cause of action, and made no objection to an order for a stay of the proceedings which had been commenced by the bankrupt before his bankruptcy. The person (in the present case the original bankrupt after he had obtained his discharge) who took an assignment of the cause of action by purchase from the trustee cannot be in any better position than the trustee himself was; and therefore if the cause of action was barred in the hands of the

(1) 60 L. T. 64.

(2) 5 Ch. D. 844.

(3) 10 Q. B. D. 114.

trustee, it was equally barred in the hands of the person who took from him by assignment. Unless there is something in the condition of things shewing a state of circumstances which would entitle the trustee, if he had not assigned the cause of action, to reopen the whole question and continue the action, his assignee cannot do so. Two views may be taken of the nature of a stay; first, that it is a discontinuance, in which case cadit quæstio; and secondly, that it is not equivalent to a discontinuance, but may be removed if proper grounds are shewn. The latter is a possible view; but the mere fact that a right of action, hampered by a stay, is transmitted to another person cannot entitle the assignee to have the stay removed; the election made by his assignor would be a sufficient answer to such a contention. Whichever view, therefore, of the legal effect of a stay of proceedings may be the correct one, it is equally irremoveable.

WRIGHT, J. I am of the same opinion. The cause of action passed to the trustee in bankruptcy; after it so passed the trustee alone had the right of action in him, and if he elected not to go on with the action, his election barred anybody who subsequently became entitled through him to the same cause of action. If, however, this is not the correct view to take, the judgment of my brother Wills leads to the same conclusion.

Appeal dismissed.

Solicitors for plaintiff: *Prince, Ayres, & Austin.*
Solicitors for defendant: *H. S. Harris & Co.*

W. J. B.

C. A.
1890
Nov. 28.

[IN THE COURT OF APPEAL.]

ABRAHAMS *v.* DEAKIN.

Master and Servant—False Imprisonment—Evidence of implied Authority—Public-house—Manager of Bar.

The plaintiff and a friend went into the defendant's public-house, and the plaintiff's friend tendered in payment for some refreshment which they had a German gold ten-mark piece by mistake for a half-sovereign, and asked the barman for change. The barman went to fetch the change; but before giving it he observed that the coin was a foreign one, and took it back to the plaintiff's friend, who gave him a half-sovereign instead of it, and the barman thereupon gave him the change. The plaintiff and his friend then left the house. A person who was acting as manager of the bar in the absence of the defendant followed them into the street, and gave them into the custody of a policeman on a charge of attempting to pass bad money. In an action for false imprisonment:—

Held, that the defendant was not liable, for that the manager had no implied authority by reason of his position to arrest the plaintiff, inasmuch as his master's property was no longer in any danger, and the arrest was made only for the purpose of vindicating the law by punishing the plaintiff for a criminal offence which he was supposed to have already committed.

Motion by the defendant, asking that the verdict for the plaintiff might be set aside and judgment entered for the defendant, on the ground that there was no evidence to support the finding of the jury.

At the trial, before Wills, J., it appeared that the action was for false imprisonment. The plaintiff was a solicitor. On July 26, 1889, he, with one Metcalfe, a solicitor's managing clerk, went into a public-house in Holborn, of which the defendant was the proprietor. They called for some refreshment, and Metcalfe took out of his pocket, without looking at it, and tendered to the barman in payment, a gold coin, which he believed to be a half-sovereign, and asked the barman to give him change. The coin was in fact a German ten-mark piece. The barman was about to give change; but, before doing so, he looked at the coin, and, seeing that it was not an English coin, he brought it back to Metcalfe, who gave him a half-sovereign instead, and the barman thereupon gave Metcalfe the change. The plaintiff and Metcalfe remained in the house some little

time, and then went out. A man called Nunney, who was managing the bar in the defendant's absence, followed them into the street, and shortly afterwards gave them both into the custody of a police-constable, on the charge of attempting to pass spurious coin. The constable took them to the police-station, where the inspector, on learning the facts, and having ascertained that the coin was a good one, refused to take the charge, and the plaintiff and Metcalfe were released. The plaintiff then brought this action against the defendant, claiming damages for false imprisonment.

The learned judge held that there was evidence to go to the jury of the authority of Nunney to do what he did, and directed the jury that the manager of a business had authority to do all things reasonably necessary for the protection of his master's interest and property, and that no people were so exposed to having bad money passed on them as publicans. The learned judge added that he did not think it was material whether the object of a manager in arresting a man was to recover property for his master, or to frighten other people from attempting to steal it.

The jury found a verdict for the plaintiff with 50*l.* damages, and the learned judge entered judgment for the plaintiff accordingly.

Cock, Q.C., and *Robert Wallace*, for the defendant. There is no evidence of any express authority given by the defendant to Nunney to arrest a person who had done what he supposed the plaintiff to have done, and from Nunney's position as manager no such authority can be implied. When he arrested the plaintiff his master's property was no longer in danger, and he was not acting for the purpose of protecting it. There was no implied authority to arrest a person who had attempted to commit a crime, in order either to punish him or to deter others from similar attempts: *Bank of New South Wales* v. *Owston* (1); *Allen* v. *London and South Western Ry. Co.* (2)

[LOPES, L.J., referred to *Poulton* v. *London and South Western Ry. Co.* (3)]

(1) 4 App. Cas. 270. (2) Law Rep. 6 Q. B. 65.
(3) Law Rep. 2 Q. B. 534.

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French, Q.C., and *J. W. Gordon*, for the plaintiff. Nunney had an implied authority to do what he did: *Limpus* v. *London General Omnibus Co.* (1) The authority was necessarily incident to his position as manager, for publicans are peculiarly exposed to attempts to pass bad money. The extent of a servant's authority is a question for the jury: *Goff* v. *Great Northern Ry. Co.* (2) The decisions in *Bank of New South Wales* v. *Owston* (3), and *Allen* v. *London and South Western Ry. Co.* (4), do not apply, and they do not bind this Court. Nunney was more than a mere servant with a subordinate authority; he had a general discretion as to the management of the business in the absence of the owner. He was really acting to protect the interests of his master. He was acting within the scope of his employment, and what he did was illegal only because done under a mistake of fact.

LORD ESHER, M.R. The facts of the case are shortly these. Nunney, who has been spoken of as the manager of the defendant's business, but who was really nothing more than the manager of the bar in a public-house, was acting in that capacity when the barman was offered by one of two customers, in payment for some refreshment which they had had, a ten-mark gold piece instead of a half-sovereign. The barman was about to give change; but, before doing so, he noticed that the coin was a foreign one, and he took it back to the person who had offered it to him, who then gave him a half-sovereign instead, and he then gave the change. The two customers went away; and shortly after Nunney went out into the street, and followed them until he found a policeman, and then gave them into custody. He did not tell the policeman what the charge was; but he took the responsibility on himself, and told the policeman to arrest them. At all events, Nunney is liable for what he did; the question is, whether his master is liable too. The evidence shewed that Nunney managed the bar of the public-house when his master was absent. There was no evidence that

(1) 1 H. & C. 526.
(2) 3 E. & E. 672.
(3) 4 App. Cas. 270.
(4) Law Rep. 6 Q. B. 65.

he was the general manager of the business; he only managed the bar when his master was away. Did that position give Nunney any authority to do that which he did? No evidence was given of any custom of the trade that the manager of the bar of a public-house should have authority to give into custody people who offer him bad money. If any such evidence had been given, it would have been a question for the jury whether the custom had been proved. Were the jury entitled to say, from the mere fact that Nunney was the manager of the bar of a public-house, that he had authority to act as he did? It is said that a publican runs a greater risk of the passing of bad money than an ordinary shopkeeper does, and so the learned judge seems to have thought; but no evidence was given of it. I doubt whether such evidence would have been admissible. But I am bound to say that I differ from the view of the learned judge. As regards the risk of things being stolen from his shop, a publican, certainly, runs no greater risk than a jeweller or a man who keeps a large haberdashery establishment. And it seems to me there is no ground for saying that a publican runs a greater risk of loss from the passing of bad money than any other shopkeeper does. Upon the evidence as it stands, was there anything which entitled the jury to draw the inference that Nunney had authority to give the plaintiff into custody? We have in the decided cases guides which are as clear as possible. In *Allen* v. *London and South Western Ry. Co.* (1), a railway company's booking clerk thought that the plaintiff had tried to steal some money out of the till (though he had not in fact done so), and he gave the plaintiff into custody. The plaintiff sued the company for false imprisonment. Blackburn, J., "left it to the jury to say whether the booking clerk acted for his own ends, and out of spite . . . in which case the defendants would not be liable for his act, or whether the booking clerk acted in furtherance, as he supposed, of his employers' interest to protect their property. The jury found that the booking clerk was acting in defence of the company's property, and returned a verdict for the plaintiff for 100*l*." Leave was reserved to the defendants to move to enter

(1) Law Rep. 6 Q. B. 65.

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a non-suit; and the Court of Queen's Bench held that there was no evidence to go to the jury that the defendants had expressly or impliedly authorized the acts of which the plaintiff complained. Blackburn, J., himself was a member of the Court of Queen's Bench, before which the rule to enter a non-suit was argued, and he held that the fact that the jury had found that the booking clerk was acting in defence of the company's property was not of itself enough to enable the plaintiff to recover. The learned judge, after stating the facts, said (at p. 68): "On these facts, it may be fairly said that the booking-clerk has an implied authority to do all acts which are necessary for the protection of the money intrusted to him. I am inclined to think that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till. I am not, however, prepared to pronounce a decided opinion on these supposed cases; the present case is altogether different. There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice." In other words, although a servant is acting with a view to protect his employer's property against similar attempts in the future, he has no implied authority to take a man into custody for that which has already been done. That is a distinct statement of the law. Then there is the case

of *Bank of New South Wales* v. *Owston* (1), a decision of the Privy Council, which, though it is not binding upon this Court, is of the greatest weight. Sir Montague Smith, who delivered the judgment of the Court, came to the conclusion that the mere fact that a man was the manager of a bank did not confer on him an implied authority to give a man into custody for stealing a bill of exchange when the act was past and gone, and the arrest of the offender was not necessary for the protection of the property of the bank, but was made only for the purpose of punishing him and vindicating the law. Though we are not bound by that decision, I have no intention of differing from it; on the contrary, I adopt it in every respect. Applying the principle of those decisions to the present case—the manager of the bar of a public-house thought that two customers had been attempting to pass bad money. He did not lay hold of them in order to prevent their doing so. He had got good money from them instead of that which he supposed to be bad. There was no property of his master which it was his duty to protect under such circumstances; and the cases to which I have referred shew clearly, in my opinion, that the mere fact that Nunney was the manager of the bar did not give him an implied authority to act as he did, and the judge ought not to have left the case to the jury at all. Judgment must be entered for the defendant.

LOPES, L.J. It is very difficult for me to add anything to what the Master of the Rolls has said. Nunney was the servant of the defendant who was in charge of the bar of the public-house at the time when the supposed attempt to pass bad money was made. The question is whether Nunney, by reason of his position, had an implied authority to do what he did, so as to render the defendant responsible for it. Wills, J., seems to have thought that the implied authority of a manager was more extensive in the case of a public-house than it would have been in the case of an ordinary shop. I cannot agree in that view. I do not see any difference. The evidence came only to this, that Nunney was the manager in charge of the bar at the time. What is the

(1) 4 App. Cas. 270.

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law applicable to such a case? In *Allen* v. *London and South Western Ry. Co.* (1), Blackburn, J., at p. 69, sums up the law thus: "The principle which governs the present case has been laid down in the cases that have been cited; there is an implied authority to do all those things that are necessary for the protection of the property intrusted to a person, or for fulfilling the duty which a person has to perform. To apply that principle to the present case, the booking-clerk had an implied authority to do everything that was necessary for the fulfilment of the duty intrusted to him; but he had no implied authority to punish for a supposed infringement of the law."

That, as it seems to me, is very applicable to the present case. Again, in *Bank of New South Wales* v. *Owston* (2), Sir Montague Smith lays down the law in similar terms.

What, then, is the nature of the authority which must be implied in the present case in order to make the defendant liable from the mere fact that Nunney was left in charge of the bar at the time? We must presume that he had authority at a time when his master's property was safe in the till—when there was no question about protecting it from danger—to go out into the street and arrest the plaintiff for something which he supposed he had attempted to do some time previously. It appears to me that Nunney was doing an act which he had no authority whatever to do; it is impossible that any such authority could be implied from his position. I think the decision of Wills, J., was wrong.

KAY, L.J. The question is, whether there was any evidence to go to the jury on which they could reasonably find that the manager of the bar of the defendant's public-house had an implied authority to punish a man for attempting to commit a criminal offence. The evidence is only that Nunney was the manager of the bar. There is no evidence that the manager of a business of this kind requires a larger authority than the manager of any other business. There is no evidence of any custom in this particular trade that a manager shall have a larger authority. There is no evidence that in this business

(1) Law Rep. 6 Q. B. 65. (2) 4 App. Cas. 270.

attempts to pass false coins are more frequently made than in others; there was only a suggestion to that effect made by the learned judge. The evidence simply comes to this, that Nunney was the manager of the bar of a public-house. After the decisions which have been cited, it could not be right for the judge to leave it to the jury to say whether Nunney had authority to do what he did. It was not a case in which any particular property of the master required protection, or the commission of a felony was to be prevented. In *Allen* v. *London and South Western Ry. Co.* (1), Blackburn, J., pointed out the distinction between protecting the property of a master and punishing a person who has attempted to injure the master's property, but has not succeeded in doing so. If a servant has an implied authority to arrest a man who, as he thinks, has attempted to pass false coin, in order to prevent other people from attempting to commit a similar offence, he must equally have an implied authority to do almost any other illegal act—for instance, to assault the supposed offender, or to libel him by publishing in a newspaper that he is a thief. Whatever the servant did for the purpose of frightening other people, and thus preventing possible injury to his master's property, the master would be liable for it. That would be clearly contrary to the decisions which have been referred to.

Appeal allowed.

Solicitors: *Peckham, Maitland, & Peckham*; *Kime & Hammond.*

(1) Law Rep. 6 Q. B. 65.

W. L. C.

C. A.
1890
Dec. 18, 19.

[IN THE COURT OF APPEAL.]

PULLMAN AND ANOTHER *v.* WALTER HILL & CO., LIMITED.

Defamation—Libel—Publication—Letter copied by Clerk—Letter addressed to Partnership Firm—Privileged Occasion.

In an action for libel it appeared that the alleged libel was contained in a letter respecting the plaintiffs, two of the members of a partnership, written on behalf of the defendants, a limited company, and sent by post in an envelope addressed to the firm. The writer did not know that there were other partners in the firm. The letter was dictated by the managing director of the defendants to a clerk, who took down the words in shorthand and then wrote them out in full by means of a type-writing machine. The letter thus written was copied by an office-boy in a copying-press. When it reached its destination, it was in the ordinary course of business opened by a clerk of the firm, and was read by two other clerks:—

Held (reversing the judgment of Day, J.), that the letter must be taken to have been published both to the plaintiffs' clerks and the defendants' clerks, and that neither occasion was privileged.

MOTION by the plaintiffs for a new trial.

At the trial before Day, J., with a jury, it appeared that the plaintiffs were members of a partnership firm of R. & J. Pullman, in which there were three other partners. The place of business of the firm was No. 17, Greek Street, Soho. The plaintiffs were the owners of some property in the Borough Road, which they had contracted in 1887 to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter:—

"Messrs. Pullman & Co., 17, Greek Street, Soho.

"*Re* Boro' Road.

"Dear Sirs,—We must call your serious attention to this matter. The builders state distinctly that you had no right to

this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

"Yours faithfully,

"(Signed) Walter Hill & Co., Limited."

This letter was dictated by the defendants' managing director to a shorthand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to Messrs. Pullman & Co., 17, Greek Street, Soho. The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore non-suited the plaintiffs.

Lockwood, Q.C., and *Oswald*, for the plaintiffs. The questions are—whether there was a publication of the libel; and, if so, whether there was privilege. It is contended that there was a publication of the libel—first, to servants of the defendant company; and secondly, to clerks employed by the plaintiffs' firm, who, in the ordinary course of business, read the letter. If that be so, no question of privilege can arise; for there was no duty towards, or interest in, those persons which could render the occasion privileged. With regard to publication to the clerks of the plaintiffs' firm, if a man writes a libellous letter, and addresses it to a business firm, he must be taken to contemplate that it may, in the ordinary course of business, be opened and read by a clerk; and, if he takes no precaution to prevent this, he is responsible for the publication. It is immaterial that he did not intend the publication. If a man writes what is libellous and puts it out of his possession, he must take care that it does not go to the wrong person: *Harrison* v. *Bush* (1); *Mayne* v.

(1) 5 E. & B. 344.

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Fletcher (1); *Rex* v. *Paine* (2); *Shepheard* v. *Whitaker*. (3) In *Tompson* v. *Dashwood* (4), where a letter, which would have been privileged if sent to the person for whom it was intended, was by mistake put into the wrong envelope and sent to another person, the question was treated as being whether the mistake destroyed the privilege; but this way of looking at the matter is fallacious, because, if there were publication to the person who actually received the libel, there was no question of privilege at all. The Court of Exchequer in Ireland decided the question the other way: *Fox* v. *Broderick*. (5) With regard to publication to servants of the defendant company, assuming that such a publication might, under certain circumstances, be privileged, the company cannot be justified in publishing the defamatory statement to any clerk in their employ: *Williamson* v. *Freer*. (6)

Murphy, Q.C., and *R. M. Bray*, for the defendants. It is contended that there was no publication of the libel; and, if there were, the occasion was privileged. For the purposes of a civil action, publication to the party libelled will not suffice; and the defendants are not responsible for the opening of the letter by the plaintiffs' clerks. With regard to the alleged publication to defendants' own servants, it is obvious that a corporation cannot write a letter except through an agent. Employing their agents in the usual and proper course of business to write a letter to the plaintiffs, and to make a copy of such letter, would, in the absence of actual malice, be privileged: *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.* (7) Great inconvenience would be caused in business, if the ordinary mode of writing and copying letters could not be employed. If what was done amounted to publication, the occasion was privileged: *Toogood* v. *Spyring* (8); *Jones* v. *Thomas* (9); *Davies* v. *Snead*. (10) The defendants had a right to send the letter, and it was their duty to do so: *Wright* v. *Woodgate* (11); *Lake* v. *King*. (12) The circumstances rebut any presumption of malice, and there is no evidence of express

(1) 4 M. & R. 311; 9 B. & C. 382.
(2) 5 Mod. 167.
(3) Law Rep. 10 C. P. 502.
(4) 11 Q. B. D. 43.
(5) 14 Ir. C. L. Rep. 453.
(6) Law Rep. 9 C. P. 393.
(7) Law Rep. 4 Q. B. 262.
(8) 1 C. M. & R. 181.
(9) 34 W. R. 104.
(10) Law Rep. 5 Q. B. 608.
(11) 2 C. M. & R. 573.
(12) 1 Wms. Saund. p. 131 b.

malice. If there is privilege as between the person who makes the communication and the person who receives it, it will not be destroyed by the mere presence of a third party.

LORD ESHER, M.R. Two points were decided by the learned judge: (1.) that there had been no publication of the letter which is alleged to be a libel; (2.) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is, whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes it contents known, I should say that would not be a publication. If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shewn it to you and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the type-writer.

Then arises the question of privilege, and that is, whether

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the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the persons libelled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore, the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this case also the occasion was not privileged for the same reasons as

in the former case. There were, therefore, two publications of the letter, and neither of them was privileged. And, there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libellous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody.

I think there ought to be a new trial.

LOPES, L.J. I also am of opinion that there should be a new trial. The first question is, whether there has been any publication of the alleged libel. What is meant by publication? The communication of the defamatory matter to a third person. Here a communication was made by the defendants' managing director to the type-writer. Moreover, the letter was directed to the plaintiffs' firm, and was opened by one of their clerks. The sender might have written "Private" outside it, in order to prevent its being opened by a clerk. The defendants placed the letter out of their own control, and took no means to prevent its being opened by the plaintiffs' clerks. In my opinion, therefore, there was a publication of the letter, not only to the type-writer, but also to the clerks of the plaintiffs' firm. Assuming, then, that there was publication, the question next arises, whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged, there is an end of the plaintiffs' case, unless express malice is proved. Was the voluntary placing of the letter in the hands of the type-writer a privileged occasion? The rule,

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I think, is this—that, when the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it. It is impossible to say that in the present case either of those doctrines applies. What duty had the defendants to make the communication to the type-writer? What interest had the defendants in making the communication to the type-writer, and what interest had the type-writer in receiving it? Clearly the defendants had neither duty nor interest, nor had the type-writer any interest. Every ground of defence, therefore, fails. It is said that our decision will cause great inconvenience in merchants' offices and will work great hardship. It is said that business cannot be carried on, if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchants' business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences.

KAY, L.J. It seems to me that this is one of the simplest cases possible, though the ingenuity of counsel has raised difficulties about it. As I understand it, the simple proposition of law is this. If A. writes defamatory matter concerning B., and sends it straight to him, no privilege is needed. But if A. writes to B. defamatory matter concerning C., then he needs privilege to protect him from liability for the libel. In the present case the letter was written to the persons concerning whom the statement was made; but the moment the letter was communicated to another person, that publication would constitute a libel, unless it was protected by some privilege. It is plain that in the present case no such privilege existed. The composer of the letter dictated it to a type-writer, and handed it to a boy to copy. I cannot conceive that there was any privilege between the managing director and the type-writer or the boy. It is said that from the necessity of the case letters written on

behalf of a joint stock company must be written by some agent, and that it is the ordinary course of business to communicate letters so written to another person in order that they may be copied, and by reason of this ordinary course of business it is said that the communication of the letter to the type-writer and to the boy who made the copy was made on a privileged occasion. I have never heard of any authority for such a proposition. The consequence of such an alteration in the law of libel would be this—that any merchant or any solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent. None of the cases cited come up to what has been contended, or anywhere near it.

Order for new trial.

Solicitors: *Emanuel, Round, & Nathan; Watney, Tilleard, & Freeman.*

W. L. C.

[IN THE COURT OF APPEAL.]

PAINE *v.* CHISHOLM.

Practice—Costs—Higher Scale, Order for Costs on — Appeal—Discretion of Judge—"Special Grounds arising out of the Nature and Importance, or the Difficulty or Urgency of the Case"—False Representation, Action for.

The jurisdiction to make an order for costs on the higher scale under Order LXV., r. 9, depends on the existence of "special grounds arising out of the nature and importance, or the difficulty or urgency of the case." Consequently, an appeal will lie against such an order on the question whether any facts existed which could constitute such special grounds.

In an action for a fraudulent misrepresentation on the sale of a public house, in which a great number of witnesses were called and the trial took seven days, the defendant having obtained the verdict, the judge who tried the case made an order giving him costs on the higher scale:—

Held, that in such a case there were no "special grounds arising out of the nature and importance or the difficulty or urgency of the case," so as to give the judge jurisdiction to make the order.

APPEAL from the order of Stephen, J., allowing the defendant costs of the action on the higher scale.

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The facts were as follows:—

The action, which was tried before the learned judge with a jury, was to recover an amount exceeding 3000*l.* as damages for a fraudulent misrepresentation alleged to have been made, upon the sale of the goodwill, &c., of a public-house, by the defendant, the vendor, to the plaintiff, the purchaser, as to the takings of the business. The fraud alleged was that the takings book had been falsified, and also that custom had been illegitimately attracted to the house by giving overmeasure to customers for the purpose of increasing the takings with a view to a sale. The trial lasted seven days, a very large number of witnesses being called on each side.

The jury found a verdict for the defendant. The learned judge thereupon gave judgment for the defendant, and upon his application made an order under Order LXV., r. 9, giving the defendant costs on the higher scale. (1)

Crispe and *Minton Senhouse*, for the plaintiff. Order LXV., r. 9, provides that the Court or a judge may make an order allowing costs on the higher scale on special grounds arising out of the nature and importance, or the difficulty or urgency of the case. Where there are no circumstances which can constitute such special grounds, an appeal will lie against such an order. The case is analogous to cases under Order LXV., r. 1, in which it has been held that an appeal lies where there is nothing that can constitute "good cause." Here there were no special grounds such as are required to give jurisdiction to the judge to make the order under Order LXV., r. 9.

The action was one of a very ordinary type. The mere facts

(1) Order LXV., r. 9: "The fees set forth in the column headed 'higher scale' in Appendix N may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration, as the case may be, so order; or if the taxing officer, under directions given to him for that purpose by the Court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid."

that there was a charge of fraud, that the trial took a long time, and that there were a great many witnesses do not constitute special grounds within the meaning of the rule. The cases contemplated by the rule are cases involving something of special importance in the nature of the case, or some peculiar difficulty or urgency, requiring an unusual exercise of skill, care, or labour on the part of the solicitor, for which he is entitled to extra remuneration. [They cited *Williamson* v. *North Staffordshire Ry. Co.* (1); *Harrison* v. *Leutner* (2); *In re Terrell.* (3)]

H. E. Duke, (*Jelf, Q.C.*, with him), for the defendant. It may be that there would be an appeal, if there were absolutely no facts that could be by any possibility considered to constitute "special grounds arising from the nature and importance of the case, &c." But, if there are facts that could constitute such grounds, there is no appeal against the discretion of the judge. In this case there was an unfounded charge of fraud, involving a very protracted inquiry and the procuring of a great quantity of evidence with regard to matters extending over a considerable period. A case in which a fraud such as this is charged is of great importance to the defendant, and involves special care and exertion on the part of the solicitor. It cannot, therefore, be said that there was nothing here that could constitute special grounds for the order.

Crispe, in reply.

Cur. adv. vult.

March 9. LORD ESHER, M.R. The point involved in this case is one of some importance. The learned judge at the trial made an order allowing costs to the defendant on the higher scale, and the question is whether there can be an appeal against such order. I think that there can be such an appeal to some extent, on grounds analogous to those upon which we have held that there may be an appeal as to costs in cases under Order LXV., r. 1, where there has been a trial before a jury, and the judge has ordered that the costs shall not follow the event. In those cases we have held that we could entertain an appeal on the question whether there was "good cause," but that, if there

(1) 32 Ch. D. 399. (2) 24 Ch. D. 594. (3) 22 Ch. D. 473.

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were, then we could go no further, and could not inquire whether in our opinion the judge had rightly exercised his discretion. The question in this case depends upon Order LXV., r. 9, which provides that the fees in the column headed "higher scale" may be allowed, "if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a judge shall so order." The conditions, therefore, on which such an order may be made are these: first, there must be something in the nature and importance of the case, or there must be difficulty or urgency in it; and then there must also be special grounds arising therefrom for making the order. It is not until those conditions are fulfilled that the judge has a discretion to make the order. Therefore, it appears to me that we should entertain the appeal to this extent: we should consider whether those conditions were fulfilled—that is to say, whether there were special grounds arising out of the nature and importance of the case, or the difficulty or urgency of the case; but, if those conditions were fulfilled, then the matter was one for the discretion of the judge, and we ought not to entertain an appeal as to the mode in which he has exercised such discretion. In my opinion the application of this rule giving power to allow costs on the higher scale ought to be strictly limited. I think that the proper rule of conduct with regard to the exercise of the discretion should be a strict rule. That this is so is very well illustrated by what was said by the members of the Court of Appeal in *Williamson* v. *North Staffordshire Ry. Co.* (1) In the present case I can see nothing peculiar in the nature or importance of the case. The question in dispute was whether a sale of the goodwill, &c., of a public-house had been brought about by fraudulent misrepresentation. I cannot see that the case involved any peculiar difficulty. What particular difficulty would a solicitor have in getting up his brief in such a case more than in any other case? It is obvious that there was no urgency in the case. Again, what special grounds could there be for the order? I can see nothing special in the case. It was one of the commonest cases that could be. It does not appear to me that when the learned judge made this order the terms of the rule

(1) 32 Ch. D. 399.

and their stringency were fully brought before him. For these reasons I think that this appeal must succeed, and costs should only be allowed on the lower scale.

BOWEN, L.J. I am of the same opinion. In this case the learned judge ordered that the costs should be taxed on the higher scale. The action was a simple action for fraudulent misrepresentation, alleged to have been made upon the sale of a public-house. Scarcely a week—I had almost said a day—passes without some specimen of that kind of action coming before the Courts. I confess that I regard with alarm the notion of allowing costs on the higher scale in such an action. The question is, whether an appeal lies against this order. That depends on the terms of s. 49 of the Judicature Act, 1873, by which it is provided that no order as to costs only, which by law are left in the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order. There is a class of cases in which the costs are left entirely in the discretion of the Court or judge, and there is no appeal against the exercise of that discretion; but there is another class of cases where the discretion as to the costs is based upon conditions, and, if those conditions are not fulfilled, the discretion does not arise. In such cases we have said that we are bound to consider whether the conditions which give the discretion have arisen; but, when once it has been found that they have, we cannot interfere with the exercise of such discretion. The most familiar of this latter class are those cases which have arisen under Order LXV., rule 1. Two kinds of cases occur under that rule. The first is, where the action relates to the administration of estates and trusts, and the appeal is by an executor or trustee who complains that he has been wrongly deprived of his right to costs out of a particular estate or fund, on the ground that he has unreasonably instituted or carried on or resisted any proceedings. The second is where an action has been tried by a jury, in which case the costs follow the event, unless the judge "for good cause" otherwise orders. In these cases, we have said that, although we cannot interfere with the mode in which the discretion of the judge has been exercised, we must consider whether or not the

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facts and circumstances of the case exclude the possibility of the existence of good cause. The rule on which the present case turns is to a great extent in pari materiâ, and framed on similar lines as Order LXV., r. 1. Order LXV., r. 9, provides that costs may be allowed on the higher scale if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a judge shall so order. If the case be one in which we can see that there can be no special grounds arising out of the nature and importance, or the difficulty or urgency of the case, we are bound to say that the conditions are not fulfilled upon which alone the higher scale of costs can be made applicable. None of us sitting in this Court would be likely to forget that the judge who presides at the trial has the circumstances of the case presented to him much more fully and in detail than we can have; and, therefore, we should hesitate long before interfering with his order; but, if we come clearly to the conclusion that the conditions upon which his discretion depended did not arise, we are bound to give effect to that conclusion. This was nothing in the world but a simple case of fraudulent misrepresentation on the sale of a public-house. No archæological or suchlike difficult inquiries were involved. How has this Court dealt with the terms of the rule? It has been in a previous case interpreted in a much stricter sense than would justify an order such as was made here. The case of *Williamson* v. *North Staffordshire Ry. Co.* (1) involved a right of great pecuniary value, and the hearing before the Vice-Chancellor took five days. The appeal against his decision was argued on four days. In that case Fry, L.J., pointed out that the rule does not say that it may be applied merely on the ground of the importance or difficulty of the case, but that in addition there must be special grounds arising out of the nature and importance, or the difficulty or urgency of the case. The Court thought that, unless there were such special grounds, the rule could not be applied; and they held that the mere length of the case or the amount involved did not constitute such special grounds. Cotton, L.J., in giving the judgment of the Court, said that, although the case was one of importance and of extreme

(1) 32 Ch. D. 399.

difficulty, he did not think that there were in it special grounds arising out of the nature and importance, or the difficulty or urgency of the case; that he found some difficulty in laying down the exact meaning of the rule; but that in the case before him, though important and difficult, there were no special grounds arising out of its importance or difficulty to justify giving costs on the higher scale. The question here is whether it is possible that in such a case as that before us there can be any special grounds arising out of the nature and importance, or the difficulty or urgency of the case, for making an order for costs on the higher scale. I do not think that it is. I should wish to add that we have not dealt lightly with this question. We took time to consider our judgment in order that we might go through all the cases that could have any bearing on the point. We have done so, and have carefully considered the matter.

FRY, L.J. I wish to add a few words, because the view taken by the learned judge in the Court below seems to differ from that which we are taking as to the meaning of the rule. I say "seems," because it does not appear to me that the attention of the learned judge was called to the precise terms of the rule. The first question is, whether an appeal lies. In my opinion, this is a case in which a discretion is given to the judge only in a certain contingency or upon certain conditions. The question whether that contingency had occurred, or whether those conditions had been fulfilled, must be matter of appeal; for, if not, the judge had no jurisdiction to make the order that he did. The contingency is defined in these terms. The judge may make the order "upon special grounds arising out of the nature and importance, or the difficulty or urgency of the case." It is to be observed, therefore, that there must be "special grounds." What the precise meaning of that expression may be it is difficult to define; but it is, at any rate, clear that it cannot apply unless there is something peculiar and special in the circumstances of the case. Again, the special grounds must arise from the nature and importance, or from the difficulty, or from the urgency of the case. I cannot find anything unusual or peculiar

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in the nature of this action, or any peculiar difficulty or urgency in it. It is a very common kind of action indeed. And there are no special circumstances connected with it that could constitute special grounds for the order. Under these circumstances, I feel bound to hold that the learned judge had no jurisdiction to make the order.

Appeal allowed.

Solicitor for plaintiff: *Edward Clarke.*

Solicitor for defendant: *Benjamin Burton.*

E. L.

C. A.

March 2.

[IN THE COURT OF APPEAL.]

BRANDON *v.* McHENRY.

Bankruptcy—Annulment of Adjudication—Proof, Rejection of—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 81—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 35 (2)—"*Act theretofore done by the Trustee.*"

By s. 81 of the Bankruptcy Act, 1869, it is provided that "whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done by the trustee or any person acting under his authority, or by the Court, shall be valid; but the property of the debtor who was adjudged a bankrupt shall in such case vest in such person as the Court may appoint, or, in default of any such appointment, revert to the bankrupt for all his estate and interest therein upon such terms and subject to such conditions, if any, as the Court may declare by order." (1)

Rejection of a proof by a trustee in bankruptcy is an act done by him within the above section.

Therefore, where a proof in a bankruptcy under the above-mentioned Act is rejected by the trustee, whose decision is not appealed against, and the bankruptcy is subsequently annulled, such rejection remains valid, and the claim for the amount sought to be proved for is consequently barred.

A judgment had been signed by consent for the amount of an alleged simple contract debt. The judgment debtor being adjudicated bankrupt, the judgment creditor claimed in the bankruptcy, not upon the judgment, but upon the simple contract debt. The trustee in bankruptcy rejected his proof on the ground that there was no debt due, and he did not appeal. The bankruptcy was subsequently annulled:—

Held, that the judgment creditor could not, after annulment of the bankruptcy, enforce the judgment.

APPEAL from an order of the Queen's Bench Division (Wills and Wright, JJ.) setting aside an execution issued by the

(1) Sect. 35 (2) of the Bankruptcy Act, 1883, is in substantially the same terms.

appellant Brandon upon a judgment for a sum of 4084*l.* and interest against the respondent McHenry.

The facts so far as material appeared to be in substance as follows. In 1879 the respondent filed a liquidation petition under the Bankruptcy Act, 1869. Meetings of creditors were thereupon held, and ultimately, in 1883, resolutions accepting a composition, under s. 126 of that Act, were passed, and afterwards duly confirmed by the creditors, and such resolutions were duly registered. In these liquidation proceedings Messrs. Brandons, a firm of solicitors, of which the appellant was the surviving member, sent in a proof for the amount of 4084*l.*, alleged to be due to them from the respondent McHenry, under a guarantee given by him in respect of certain costs. The composition agreed upon was never paid. On July 15, 1885, the judgment in question was signed by consent in an action by the appellant's firm against the respondent for the amount of the claim for costs under the guarantee. In 1886 the respondent was adjudicated a bankrupt under the power conferred on the Court of Bankruptcy by the last clause of s. 126 of the Bankruptcy Act, 1869. (1) The proofs in the previous liquidation proceedings were transferred to the bankruptcy proceedings. The trustees appointed in the bankruptcy proceeded to examine the proofs, and, after examination of the appellant, rejected the proof sent in by his firm, on the ground that there was no debt due from the bankrupt to them. The firm thereupon applied to the Registrar in Bankruptcy to name a day to hear an application to extend the time for applying to the Court on appeal against the rejection of the proof, or in the alternative to appoint a day for hearing an application to admit it; but the registrar directed them to give notice to the trustees, requiring them to state the reasons for the rejection of the proof. The appellant's firm accordingly wrote to the solicitors to the trustees informing them that they had made the above-mentioned application, and what the registrar had directed. The trustees' solicitors in their reply drew attention to the fact that the time for appealing against the rejection of the proof would shortly expire, and stated that their clients objected to any extension of it. No

(1) See Bankruptcy Act, 1883, s. 169 (3), which preserves the provisions of the Act of 1869, so far as pending proceedings are concerned.

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further proceedings were taken by way of appeal against the rejection of the proof, and, as will be seen, the Court considered that such appeal had been abandoned. No dividends were ever declared in the bankruptcy, and in 1890 the adjudication of bankruptcy was annulled on the ground that all the creditors who had proved in the bankruptcy and whose claims had been admitted, had either been paid or satisfied in respect of their claims or consented to the annulment. The appellant subsequently issued execution upon the judgment. An application was thereupon made by the respondent at chambers to set aside the judgment and execution thereon, but was refused by the master, whose decision was affirmed, on appeal, by the judge at chambers. The Divisional Court, on appeal, refused to set aside the judgment, but set aside the execution.

Murphy, Q.C., and *Lumley Smith*, Q.C. (*Herbert Reed*, with them), for the appellant, the judgment creditor. Nothing has occurred to bar the appellant's rights on the judgment. No proof upon the judgment was ever sent in under the bankruptcy. The proof originally sent in upon the simple contract debt under the liquidation proceedings was rejected by the trustees; but that debt then no longer existed, because it was merged in the judgment, and the rejection of the proof for that could not affect the judgment debt, which therefore still exists after the bankruptcy has been annulled. Besides, the appellant gave notice of appeal against the trustees' decision, and that appeal was never abandoned, but must be considered to have been pending when the bankruptcy was annulled. The appellant did not force the appeal on; and, under the circumstances, it not being thought then that there was any chance of a dividend, neither party moved in the matter, and the appeal consequently remained undetermined. The appellant could have come in at any time in the bankruptcy and proved upon the judgment. It was held, no doubt, in *Smallcombe* v. *Olivier* (1), that an annulment of a bankruptcy did not invalidate the previous proceedings, but merely amounted to a supersedeas so far as the future was concerned: but that case does not decide anything as to the effect of proof and the rights of creditors after an annulment. It is contended

(1) 13 M. & W. 77.

that the effect of an annulment of bankruptcy, on the ground that all creditors proving have been paid in full, is that the bankruptcy proceedings are superseded, except so far as dispositions of property and payments made under the bankruptcy, and such like administrative acts are concerned; but the rights of creditors who have not proved, as it is contended the appellant has not in respect of this judgment debt, or whose claims have not been admitted in the bankruptcy, remain unaffected; and they can then enforce such rights as if there never had been any bankruptcy. Rejection of a proof by the trustee is not an act done by him within the meaning of s. 81 of the Bankruptcy Act, 1869. The scope of that section is only to prevent the annulment of the bankruptcy from invalidating dispositions of property and payments made under the bankruptcy and matters of that sort. [They also cited *Bailey* v. *Johnson*. (1)]

Sir E. Clarke, S.G., and *W. Baugh Allen*, for the respondent, were not called upon.

LORD ESHER, M.R. It appears to me that this case may be decided entirely upon the effect of the 81st section of the Bankruptcy Act, 1869. When the respondent was made a bankrupt, the appellant had a right to prove on the judgment; but, if he had taken that course, there was power in the bankruptcy proceedings to go behind the judgment and inquire whether it was founded on good consideration. So that the proof substantially would be a claim for the amount of 4084*l.*, a claim that the bankrupt was indebted in that sum on the contract that originally existed, which debt had been turned into a judgment. The appellant did, in fact, claim in respect of the consideration for the judgment alone, by allowing the old proof made in the previous liquidation proceedings to stand. The trustees in bankruptcy decided against him with regard to that, on the ground that there never was a valid claim. If he had claimed in respect of the judgment, the trustees would have done the same thing, for they could have looked behind the judgment, and have said that it was founded on a claim for a debt which had no existence. So that, if the claim had been put in that

(1) Law Rep. 7 Ex. 263.

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way, it would equally have been rejected, and the result would have been the same. I agree with Wright, J., that the thing claimed in bankruptcy is the debt; and whether it was claimed as a simple contract or a judgment debt is immaterial. It is a claim for so much money, whether on the original consideration or on the judgment. That claim the trustees rejected. Then the appellant began an appeal to the Court of Bankruptcy against the decision of the trustees. It is obvious to my mind, upon the facts, that he abandoned the appeal; and therefore the original decision of the trustees remained unchallenged. The result is the same as if he had never appealed. Therefore the case stands thus: there is a claim in the bankruptcy; it is rejected by the trustees; and there is no appeal against their decision. Afterwards the bankruptcy is annulled. What, then, is the effect of the annulment? The 81st section of the Bankruptcy Act, 1869, provided that, "whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property, and payments duly made, and all acts theretofore done by the trustee or any person acting under his authority, or by the Court, shall be valid." It seems to me that the rejection of a claim by the trustee is an act done by him within the meaning of the section, and therefore such rejection holds good after the annulment of the bankruptcy. If that is so, the claim so rejected cannot be enforced after the bankruptcy is annulled. It is not necessary to decide whether the judgment could be set aside. It appears to me clear that no step to enforce it can be taken under the circumstances that exist. For these reasons I am of opinion that the appeal should be dismissed.

FRY, L.J. I am of the same opinion. According to the appellant's case the respondent was indebted to him in a certain amount upon a guarantee for costs in 1879. There were in that year proceedings under s. 126 of the Bankruptcy Act, 1869. A proof was filed in respect of the appellant's claim in those proceedings. The respondent was made a bankrupt in 1886; and, the file of the former proceedings being adopted in that bankruptcy, it became the duty of the trustees in bankruptcy to consider the proofs put in under those proceedings. The trustees

rejected the appellant's claim. It was clearly impossible to claim the amount both on the original consideration and on the judgment; and here the claim was allowed to stand in respect of the original consideration. That being so, the appellant could not, I think, afterwards set up what is really the same debt on the judgment. Moreover, in bankruptcy it was competent for the trustees and the Court to consider whether the judgment was founded on any good consideration. It seems to me, therefore, clear that the effect of what happened is that the claim for this amount, in whichever way it is put, must be treated as having been rejected by the trustees. It is further apparent to my mind that the appellant did not appeal effectively against that rejection. He applied to fix a day for hearing an application for an extension of time, or, in the alternative, for hearing the appeal; but he did not follow that application up, although a letter was written afterwards by the trustees' solicitors calling attention to the lapse of time, and stating that they should object to any extension of time. That letter ought to have put the appellant on immediate action; but he did nothing in relation to the matter. It seems to me clear that he practically abandoned the appeal, and so the rejection of the claim stood. Then what is the effect of the annulment of the bankruptcy? The 81st section of the Act of 1869 provides that, whenever any adjudication in bankruptcy is annulled, all debts and dispositions of property, and payments duly made, and all acts theretofore done, by the trustee, or any person acting under his authority, or by the Court, shall be valid. The section does not relate merely to dispositions of property, but speaks of "all acts" done by the trustee. It seems to me that that expression must include rejection of a proof. If that be so, then such a rejection continues valid and binding on the parties notwithstanding the annulment of the bankruptcy. Whether the effect would be to authorize an application to set aside the judgment, or merely an application to prevent or set aside execution upon it, is a question which does not arise on this appeal, and I express no opinion upon it.

Appeal dismissed.

Solicitors for appellant: *Brandons.*

Solicitors for respondent: *Hores & Pattisson.*

E. L.

C. A.
1891
Jan. 23.

[IN THE COURT OF APPEAL.]

TURNER *v.* GOLDSMITH.

Contract—Principal and Agent—Contract to employ for Time certain—Impossibility of Performance—Implied Condition.

The defendant, a shirt manufacturer, by contract in writing, agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant as agent, canvasser, and traveller on the terms—first, that the agency should be determinable by either party at the end of five years by notice; secondly, that the plaintiff should do his utmost to obtain orders for and sell the various goods "manufactured or sold by the defendant as should from time to time be forwarded or submitted by sample or pattern to T." And it was further provided that the plaintiff should be remunerated by such commission as was specified in the contract. After about two years the defendant's manufactory was burnt down, and he did not resume business, and thenceforth did not employ the plaintiff, who brought an action for damages for breach of contract:—

Held, by the Court of Appeal, reversing the decision of Grantham, J., that the action was maintainable, and that the plaintiff was entitled to substantial damages, for the defendant, having agreed to employ the plaintiff for five years, did not fulfil that agreement unless he sent him a reasonable amount of samples to enable him to earn his commission; and that the defendant was not excused from fulfilling his agreement by the destruction of his manufactory by fire.

Rhodes v. *Forwood* (1 App. Cas. 256) distinguished.

Appeal against the judgment of Grantham, J., for the defendant at the trial of the action.

It appeared that on January 31, 1887, an agreement was entered into between the defendant "and any partner he may hereafter take into business, carrying on business as shirt, collar, and cuff manufacturer, under the style of the 'Priory Manufacturing Company,' and hereafter called the said company, of the one part," and the plaintiff, A. S. Turner, of the other part. By this agreement the said company agreed to employ the plaintiff as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions thereinafter contained, and in consideration of the premises the plaintiff thereby agreed with the company that he should and would diligently, faithfully, and honestly serve the company as their agent, canvasser, and traveller upon the terms and subject to the stipulations and

conditions thereinafter contained. And the company and the plaintiff thereby respectively agreed to perform the several conditions and stipulations thereinafter contained. These conditions were as follows: "(1.) The agency shall be deemed to have commenced on the 31st day of January, 1887, and shall be determinable either by the company or the said A. S. Turner at the end of five years from the date hereof upon three calendar months' notice in writing being given by the party desiring to determine the said agency to the other or others of them." (There followed provisions as to the mode of service of the notice.) "(2.) The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods *manufactured or sold* by the said company as shall be from time to time forwarded or submitted by sample or pattern to him at list price to good and substantial customers, and shall in no case sell any goods at lower price than may be authorized in writing by the said company." "(5.) The said A. S. Turner shall not either by himself, partner, agent, or other persons whatsoever, sell or offer for sale any shirts, collars, cuffs, fronts, or any goods of the description *manufactured or sold* by the said company during the time," &c. "(8). The said company shall pay to the said A. S. Turner the sum of $3\frac{3}{4}$ per cent. commission on all goods sold by him for them. The commission as aforesaid shall be paid on the 20th days of March, June, September, and December on all goods sold and delivered by the said company through the agency of the said A. S. Turner, and which may have been then actually paid for; but the said company shall not be liable to pay commission on any sums not actually received by them." The other clauses of the agreement do not bear on the question before the Court.

In March, 1889, the manufacturing premises of the defendant where he carried on the business of a shirt, collar, and cuff manufacturer, were burnt down. The defendant did not thenceforth resume business; and from the time of the fire he ceased to employ the plaintiff.

The plaintiff, on May 31, 1889, commenced this action, claiming 400*l.* damages for breach of contract.

The jury assessed the damages at 125*l.*, the question whether there had been a breach of contract being reserved. This

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question was subsequently argued before Grantham, J., who directed judgment to be entered for the defendant.

Winch, Q.C., and *H. Kisch*, for the plaintiff. The agreement is to employ the plaintiff for five years, and that contract has been broken. The plaintiff is, therefore, entitled to damages, for the defendant has no right to discontinue the business: *Macintyre* v. *Belcher*. (1) A contract must be implied to supply goods, and to continue the business for that purpose.

[KAY, L.J. Can you import more than that the defendant will not wilfully discontinue the business?]

Perhaps not.

[LOPES, L.J. That would not be sufficient for you. Here there was a fire.]

The business must be taken to have been wilfully discontinued. The fire might prevent the defendant from manufacturing; but the plaintiff was to be employed about goods sold as well as those manufactured by the defendant. There is nothing to shew that the goods were to be goods manufactured in this particular factory. The terms of the agreement are to employ the plaintiff for five years, and the defendant must shew some ground for being relieved from fulfilling his bargain.

E. Bullen, for the defendant. In the first place, the agreement was only that the plaintiff should procure orders for such goods as should be sent to him or submitted by sample or pattern. There is no contract to send him goods or samples; so there is an absence of agreement to do anything which would enable him to earn commission, and he has suffered no loss. Again, supposing there is such a contract as the plaintiff alleges, the fire made its performance impossible, and the defendant is not liable. There is no implied contract to continue the business where the agent is paid by commission: *Rhodes* v. *Forwood* (2), though there may be a difference where he is paid by salary. In *Ex parte Maclure* (3), an agent was held to have no claim in respect of commission against a company in winding-up, though he was allowed a proof for his fixed salary.

(1) 14 C. B. (N.S.) 654. (2) 1 App. Cas. 256.
(3) Law Rep. 5 Ch. 737.

[KAY, L.J., referred to *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy*. (1)]

In *Taylor* v. *Caldwell* (2) it was held that there was an implied condition that the business of the person contracting must continue, and that, as it had ceased, he was relieved from his obligations.

Winch, Q.C., in reply. As to the first point taken by the defendant, he was bound by his contract to employ the plaintiff, and therefore to find samples: *Whittle* v. *Frankland*. (3) As to the impossibility of performance, physical impossibility must be shewn. In *Lloyd* v. *Guibert* (4) it is laid down that, by the common law, a person who contracts to do a thing not naturally impossible is not excused for non-performance because he is prevented by the act of God or the king's enemies. The learned judge has construed this as an agreement relating only to goods made in a particular factory; but there is no ground for such a construction.

[KAY, L.J. The factory having been destroyed by fire, there might be an interval, during which the defendant would have no goods. Do you say that you could have damages for that period?]

No. Such a circumstance must be taken into account in estimating the damages.

[LINDLEY, L.J., intimated that the Court thought the damages too high, and asked whether the plaintiff would prefer having a new trial, or allowing the Court to reduce the damages to what they thought reasonable. The plaintiff chose the latter alternative.]

LINDLEY, L.J. This is an action for breach of contract in not employing the plaintiff for the period of five years. The contract turns upon the construction of the agreement entered into by the parties, and the application of it in the events which have happened. The plaintiff wished to act as traveller to the defendant, and the defendant wished to engage him in that capacity. An agreement, dated January 31, 1887, was entered into between them, which contained this recital: "Whereas, in

(1) Law Rep. 3 Ind. App. 200.
(2) 3 B. & S. 826.
(3) 31 L. J. (M.C.) 81.
(4) Law Rep. 1 Q. B. 115, 121.

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consideration of the agreement of the said A. S. Turner, the said company" (i.e., Mr. Goldsmith, and any partner he might have) "agree to employ the said A. S. Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained." Stopping there, we have a clear agreement by the company to employ the plaintiff, and by the plaintiff to serve the company—and on what terms? (1.) That the agency shall commence as from January 31, 1887, and shall be determinable either by the company or Turner at the end of five years from the date of the agreement upon giving such notice as therein mentioned. (2.) "The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded or submitted by sample or pattern to him at list price to good and substantial customers." Clause 5 is only material because it repeats the words "manufactured or sold by the said company." The 8th clause provides for the plaintiff's remuneration by a commission on the goods sold by him. The other clauses are not material as regards the question before us.

It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission. The answer to that is, that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burnt down; the defendant has given up business, and has made no effort to resume it. The plaintiff then says, "I am entitled to damages for your breach of the

agreement to employ me for five years." The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How, then, can such a condition as the defendant contends for be implied?

It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes* v. *Forwood* (1) it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him.

In *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (2), there was a contract in a partnership deed to employ one of the partners during his life as sole agent to effect purchases and sales on behalf of the partnership at a commission upon his sales. The partnership was dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit. It was held that the employment was to sell on behalf of the partnership; that, the partnership having come to an end, the employment ceased, and that the partner could not claim any compensation, for that a contract to carry on the partnership during the claimant's life under all circumstances could not be implied.

Taylor v. *Caldwell* (3) contains some observations which are very much in point. Blackburn, J., there says: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which we think establish the principle that where from the nature of the contract it appears that the parties must from the beginning

(1) 1 App. Cas. 256. (2) Law Rep. 3 Ind. App. 200.

(3) 3 B. & S. 826, 833.

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have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." The substance of that is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action therefore, in my opinion, is maintainable.

The plaintiff then is entitled to damages, and in my opinion not merely to nominal damages; for, if I am right in my construction of the agreement, he has suffered substantial loss. We think, however, that 125*l.* is too much, and the plaintiff's counsel having agreed to take our assessment of damages rather than be sent to a new trial, we assess them at 50*l.*, and direct judgment to be entered for the plaintiff for that amount.

KAY, L.J. The Lord Justice Lopes desires me to say that he concurs in our decision. If it had been shewn that not only the manufactory but the business of the defendant had been destroyed by vis major, without any default of the defendant, I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement. The contract is peculiar; it is to employ the plaintiff for five years certain, with power to either party to determine the employment at the

end of that time by notice. The defendant has ceased to employ the plaintiff within the five years, and contends that a condition is to be implied that the manufactory must continue to exist. The plaintiff is not seeking to import anything into the contract; the defendant seeks to import the implied condition I have mentioned. I cannot import any such condition. If it had been proved that the defendant's power to carry on business had been taken away by something for which he was not responsible, I should say that there was no breach of the agreement; but here it was not taken away, and our decision is quite consistent with the class of cases where the parties have been excused from the performance of a contract because it was considered to be subject to an implied condition.

Appeal allowed.

Solicitors: *Alfred Slater; W. H. Elphinstone Stone, for S. B. Cresswell, Taunton.*

H. C. J.

SEAGROVE *v.* PARKS. *Feb.* 26.

Practice—Leave to serve Writ out of Jurisdiction—Officer on board Queen's Ship on High Seas—"Place or Country where Defendant is or probably may be found"—Order XI., *r.* 4.

Upon an application for leave to serve a writ out of the jurisdiction it appeared that the defendant was a British naval officer on board a man-of-war at the Mediterranean station, which at the time of the application was on the high seas, but would touch at one or other of the coaling ports in the Mediterranean and would ultimately put into Malta, the chief port on the station:—

Held, that it was not sufficiently shewn in what place or country the defendant "was or might probably be found," within the meaning of Order XI., r. 4, and that leave to serve the writ out of the jurisdiction must be refused.

APPEAL from a refusal of Denman, J., at chambers, to give leave to serve a writ out of the jurisdiction.

It appeared from the affidavit used in support of the application that the defendant was a naval officer on board H.M.S. *Cockatrice*, appointed to the Mediterranean station, and that at the time of the application the ship was on the high seas. There were certain coaling ports at which the ship would touch, and in due course she would put into Malta, the chief port on the station. It was stated that leave had been granted by

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Vaughan Williams and Lawrance, JJ., respectively at chambers, in similar applications by the plaintiffs in actions against other officers on board ships on the Mediterranean station, the orders giving leave to serve the writ "at Malta or elsewhere in the Mediterranean." The application in the present case was refused by Denman, J., upon the ground that, as the defendant was on the high seas at the time of the application, the affidavit did not sufficiently shew, nor could it be shewn, "in what place or country such defendant is or probably may be found," as required by Order XI., r. 4. The plaintiffs appealed.

Montague Lush, for the plaintiffs.

PER CURIAM (Cave and Charles, JJ.). The decision must be affirmed. As long as the defendant is on board his ship, he is within the jurisdiction, and Order XI. is unnecessary and inapplicable. If it is sought to serve him out of the jurisdiction, upon his quitting his ship, the affidavit does not comply with the requirements of Order XI., r. 4.

Appeal dismissed.

Solicitors for plaintiffs: *Seagrove & Woods.*

W. J. B.

March 13.

LYSAGHT, LIMITED *v.* CLARK & CO.

Practice—Service of Writ—Action against Firm carrying on Business in England—One Partner domiciled and resident abroad—Service on another Partner resident within Jurisdiction—Summary Judgment against Firm—Order IX., r. 6; Order XIV., r. 1.

Two persons, subjects of a foreign state, carried on business as co-partners in England. One of them resided in England, the other resided and was domiciled abroad. A writ having been issued against them in the name of their firm, the partner resident in England was served with such writ under Order IX., r. 6, and appeared. There being no defence to the action, judgment was entered against the firm under Order XIV. :—

Held, that the service on the partner was a good service on the firm, and that judgment was rightly entered against the firm.

APPEAL from chambers.

This was an action against the acceptors of two bills of exchange.

The defendants were two brothers, Juan Eduardo Clark and Mateo Clark, subjects of the Republic of Chili, carrying on business in partnership in London under the style of J. E. & M. Clark & Co., and also at Buenos Ayres. The defendant Mateo Clark resided in London, the other defendant was and always had been resident and domiciled in South America. The writ was issued against the defendants in the name of their firm, and was served on Mateo Clark in London under Order IX., r. 6. Mateo Clark appeared to the writ; and there being no defence to the action, the plaintiffs obtained judgment under Order XIV. against the firm. The defendants thereupon took out a summons in terms of the order of the Court in *Western National Bank, &c.* v. *Perez, Triana & Co.* (1), that the plaintiffs be ordered to elect to amend the writ so as to shew that Mateo Clark was sued with another partner to be named separately in the writ, or to have the service of the writ on Mateo Clark set aside, and also a further summons to set aside the judgment under Order XIV. The master dismissed both summonses. The defendants having appealed against both orders, Denman, J., referred the questions to the Divisional Court.

Finlay, Q.C., and *Danckwerts*, for the defendants. The procedure under Order IX., r. 6, is applicable only where all the partners are domiciled within the jurisdiction. The fact that the firm carries on business here is not enough. In *Russell* v. *Cambefort* (2) the business was carried on within the jurisdiction; but it was there held that service on the manager was not a good service on the firm so as to bind the partners resident out of the jurisdiction. Then neither can service on one partner who resides within the jurisdiction bind a partner who resides out of it; for no distinction can be drawn between service on a manager and service on a partner. It is true that in *Shepherd* v. *Hirsch* (3), where a British subject resident here carried on business in England in partnership with a foreigner domiciled in France, it was held that Order IX., r. 6, applied. But that case has been overruled by *Western National Bank, &c.* v. *Perez, Triana & Co.* (1) The proper course in such a case as the present is to

(1) [1891] 1 Q. B. 304. (2) 23 Q. B. D. 526. (3) 45 Ch. D. 231.

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serve the foreign partner out of the jurisdiction under Order XI. Then, as to the judgment that has been entered against the firm, Order XIV., r. 1, is not applicable, for that rule only applies "where the defendant appears," by which is meant, in the case of an action against a firm, "where all the partners appear." A firm, as such, cannot appear: *Taylor* v. *Collier*. (1)

F. W. Hollams, for the plaintiffs, was not called on.

CAVE, J. In this case there were two summonses, one to set aside service of the writ, which had been served on one partner only, and the other to set aside judgment which had been entered against the firm under Order XIV.

The defendants are the two partners of a firm carrying on business in London and also at Buenos Ayres. They are both natives of Chili; one of them resides in Buenos Ayres, and the other in England. The question is whether, where they are jointly sued in the name of their firm, it is necessary that they should both be served with the writ of summons. It was said on the part of the defendants that the partner resident out of the jurisdiction might have been served under Order XI. That may be; but it does not conclude the question. It does not follow that he ought necessarily to have been so served, or that he could not have been got at in any other way. The first rule which it is important to consider in connection with this question is Order XVI., r. 14, which provides that "any two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action." Why does that not apply to the present case? The language of the rule is perfectly general. Then Order IX., r. 6, points out how Order XVI., r. 14, is to be carried out: "Where persons are sued as partners in the name of the firm, the writ shall be served either on any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service on

(1) 30 W. R. 701.

the firm." There is nothing in the rules, so far as I am aware, to prevent the application of that rule to such a case as this.

But then it was said that there were authorities which precluded us from so holding. The first case relied on was *Russell* v. *Cambefort*. (1) It was there held that Order IX., r. 6, did not apply where all the partners of the firm were resident abroad, and that service on the manager within the jurisdiction was not a good service on the partnership. But that is not the case here, for one of the partners is resident within the jurisdiction. Then it was contended that *Western National Bank, &c.* v. *Perez, Triana & Co.* (2) carried the principle of *Russell* v. *Cambefort* (1) a step further. There, in an action against a foreign firm, all the partners of which were resident abroad, it was held that service in England on a partner temporarily there was a bad service on the firm. But the reason of the decision is plain. Bowen, L.J. (at p. 316) said: "I do not think that the field is open to me to discuss this broad and important subject upon principle apart from authority. *Russell* v. *Cambefort* (1) was a case which arose under the same rule and order, although the service in that case was effected, not on a partner, but on a manager of the partnership business. The judgment of the Court of Appeal was however based expressly on the view that Order IX., r. 6, was not intended to govern writs directed against foreign firms, none of whose partners were resident or domiciled in England, and I do not think we should be carrying out the real view of the law so laid down if we were to seek to distinguish the case of service effected on a partner under one portion of the rule from that of service effected on a manager under the other portion of it." The limit put on the application of Order IX., r. 6, was that it does not cover writs against a firm all the partners of which are resident abroad. We are now asked to go further and hold that the rule does not apply to a case of a firm carrying on business in England, some one or more of the partners of which are resident abroad. But that I do not think we can do. Suppose the case of a firm carrying on business in England, all the partners being domiciled Englishmen, and suppose that one of the partners were temporarily abroad, surely the procedure against the firm could be

(1) 23 Q. B. D. 526. (2) [1891] 1 Q. B. 304.

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resorted to. If it could not then there would be great difficulty in the way of ever resorting to that procedure; for before serving the writ the plaintiff would always have to make sure that none of the partners were temporarily out of the jurisdiction. One can see that if that were the law it would afford a ready means to firms who were dishonestly inclined to evade the payment of their debts. But if the rule does apply to the case of a firm carrying on business in England, and the members of which are all domiciled in England, I do not see why it should not equally apply to the case of a firm carrying on business in England where one of the partners is domiciled abroad. I am of opinion, therefore, that the order refusing to set aside service was rightly made.

Then as to the other order refusing to set aside the judgment signed against the firm under Order XIV. It was contended that inasmuch as Order XIV. only applies "where the defendant appears" it can have no application to a firm unless all the partners appear. But that is substantially the same question as that with which I have already dealt. The appearance of one partner is the appearance of the firm; and one partner here having appeared, judgment was rightly entered against the firm.

GRANTHAM, J. I am of the same opinion.

Appeals dismissed.

Solicitors for plaintiffs: *Hollams, Sons, Coward, & Hawksley.*
Solicitors for defendants: *Norton, Rose, Norton, & Co.*

J. F. C.

HENDERSON *v.* THE UNDERWRITING AND AGENCY ASSOCIATION, LIMITED. 1891 *March* 9.

Practice—Discovery—Action on Policy of Insurance—Order for Production (Underwriters)—Appendix K., No. 19 — *Discovery before Delivery of Defence.*

By a policy of insurance goods were insured during their transit by post from Cadiz to Alexandretta, in Syria, against certain perils. The period covered by the policy was from the date of posting until delivery into the hands of the consignee; but, except that the policy covered such portion of the transit as was by land as well as the portion which was by sea, it was in the form of an ordinary Lloyds' policy. In an action on the policy by the assured, the defendants sought to obtain from the plaintiff and all persons interested in the proceedings and in the insurance the subject of the action, production of the various documents specified in the form Appendix K., No. 19, so far as they related to the subject-matter of the insurance :—

Held, that the defendants were not entitled to discovery to the full extent of the application, but that they were entitled to discovery in the ordinary form under Order XXXI., r. 12, before defence delivered, and the time for delivering such defence was extended until after such discovery should have been given.

APPEAL from chambers.

The plaintiff, by a policy of insurance, insured with the defendants two title-deeds during their transit by post from Cadiz to Alexandretta, in Syria, against certain perils enumerated in the policy, including perils of transit and conveyance and thieves. The policy provided that the risk was to commence from the date of posting, and was to continue down to the time of delivery into the hands of the consignee. It was in the form of an ordinary Lloyds' policy, with such alterations as were necessary to allow of its application to a transit which was partly by land. The deeds having been lost in the course of transit, the plaintiff brought an action on the policy.

The defendants, before putting in their defence, applied for an order that the plaintiff and all persons interested in the proceedings and in the insurance the subject of the action should produce and shew to the defendants upon oath all insurance slips, policies, letters of instruction, or other orders for effecting such slips or policies, or relating to the insurance, or the subject-matter of the insurance in question in the action, and also all documents relating to the sailing or alleged loss of the said

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subject-matter, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the said subject-matter, or any other insurance whatsoever effected on the said subject-matter, on the voyage insured by or relating to the policy sued upon in the action, or any other policy whatsoever effected on the said subject-matter of insurance on the same voyage. Also all correspondence with any person or persons relating to the subject-matter previous to the commencement of or during the risk upon which the alleged loss happened. Also all documents in the custody, possession, or power of the plaintiff and the other said persons as aforesaid, or his or their agents, in any way relating or referring to the matters in question in the action.

The master refused the application. The defendants having appealed to the judge, Denman, J., referred the question to the Court.

F. W. Hollams, for the defendants. The practice of granting to underwriters discovery in the form in which it is here sought has been in existence in the case of marine insurance actions since the beginning of the century; and that practice has not been superseded by the Judicature Acts: *West of England and South Wales District Bank* v. *Canton Insurance Co.* (1) The ground of the practice is, as stated by Brett, L.J., in *China Steamship Co.* v. *Commercial Assurance Co.* (2), that "the underwriters have no means of knowing how a loss was caused; it occurs abroad when the ship is entirely under the control of the assured. In addition to this, the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested; and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters." The only question then is whether this is a case of marine insurance. The risk is a marine risk wherever, as here, a substantial portion of the transit is sea carriage. The underwriters are just as much in the dark as if the risk were a purely marine risk, and they are equally entitled to know what persons besides the plaintiff are interested in the policy.

(1) 2 Ex D. 472. (2) 8 Q. B. D. 145.

T. E. Scrutton, for the plaintiff. The defendants are entitled to nothing more than discovery in the ordinary form, which by Order XXXI., r. 12, can be obtained only against parties to the action. If the wide form of discovery sought is to be allowed in such a case as this, it ought equally to be allowed in a case where the risk is confined to carriage by land. In the case of a marine policy on a ship, where the subject-matter is "entirely under the control of the assured," it may be reasonable that documents should be disclosed which would shew whether the ship was seaworthy, or whether there had been a deviation. The extension of that discovery, even to a marine policy on goods, has generally been regarded as somewhat anomalous. But here it is sought to extend it still further to a policy on goods carried by land, which the Court will not permit. The subject-matter was not under the control of the assured, for during the whole of the risk it was in the hands of the Post Office.

Hollams, in reply.

CAVE, J. I do not think that this is a case to which the peculiar practice which prevails in marine insurance actions can be held to apply. No doubt, the risk here is in some respects a marine risk; but that is not enough. It would be proper, however, that the plaintiff should make an affidavit of documents in the ordinary form under Order XXXI., r. 12, at once. To that much, I think, the defendants are entitled.

JEUNE, J., concurred.

Order accordingly. The defendants to have fourteen days to deliver defence after affidavit filed.

Solicitors for plaintiff: *Harcourt & Sons.*

Solicitors for defendants: *Waltons, Johnson, & Bubb.*

J. F. C.

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Feb. 5.

BOWERS (Surveyor of Taxes), Appellant; HARDING, Respondent.

Revenue—Income-tax—Deductions—Public Office or Employment—Money expended in Performance of Duties of Office—Husband and Wife—Joint Income—Assessment of Husband on Wife's Profits—5 & 6 *Vict. c.* 35, *s.* 45—16 & 17 *Vict. c.* 34, *s.* 2, *Sched. E, s.* 51.

The respondent and his wife were master and mistress of a national school, and were paid a joint salary. The respondent was assessed to income-tax, under 16 & 17 Vict. c. 34, s. 2, Sched. E, on the balance (after allowing certain deductions) of the joint income of himself and his wife. A further allowance was claimed for the wages and maintenance of a domestic servant, whose employment was necessary in order that the duties of the respondent's household might be carried on while his wife was engaged in the school:—

Held, that the respondent held a public office or employment of profit within the meaning of Schedule E; that the deduction claimed was not for money wholly, exclusively, and necessarily expended in the performance of the duties of the respondent's office or employment within the meaning of 16 & 17 Vict. c. 34, s. 51; that by 5 & 6 Vict. c. 35, s. 45 the profits of the wife were rightly charged as the profits of the husband, and, therefore, the respondent was liable to be assessed on the joint income, and the deduction could not be allowed.

Case stated for the opinion of the Court under 43 & 44 Vict. c. 19, s. 59.

The appeal was against the allowance by the district commissioners of a certain deduction in the assessment of the respondent to income-tax.

The respondent was a national schoolmaster and choirmaster, and his wife was the schoolmistress, their joint incomes amounting to 160*l.* a year, including 10*l.* paid to the respondent for his services as choirmaster.

The assessment appealed against was an assessment under Schedule E of 16 & 17 Vict. c. 34, s. 2, on 160*l.*, less the statutory abatement of 120*l.* (1), on all incomes under 400*l.*, and certain other allowances, leaving a balance of 28*l.*, upon which the duty was charged.

The respondent claimed, and the district commissioners granted on appeal, a further allowance of 30*l.* for the wages and maintenance of a domestic servant, whose employment was admitted to be necessary in order that the duties of the respondent's house-

(1) 39 & 40 Vict. c. 16, s. 8.

hold might be carried on while his wife was engaged in the school, the result of such allowance being to entitle the respondent to total exemption.

The question for the opinion of the Court was whether the expenditure of 30*l.* was a proper deduction to be made in ascertaining the liability of the respondent to assessment to income-tax under Schedule E. (1)

Sir Edward Clarke, S.G., and *Danckwerts*, for the Crown, in support of the appeal. This deduction was wrongly allowed by the district commissioners, and the original assessment was right. The case comes within 16 & 17 Vict. c. 34, s. 2, Sched. E, for the office held by the respondent is a "public office or employment of profit." No other deductions than those specified in s. 51 of the same Act can be allowed, and the deduction claimed in the present case does not come within the terms of that section. By 5 & 6 Vict. c. 35, s. 45, the profits of a married woman living with her husband are to be deemed the profits of the husband, and charged in his name. Therefore, whatever proportion of the income may as a matter of fact be earned by the wife is, for the purpose of taxation, the husband's income as much as whatever proportion he himself earns.

[They referred to *Cook* v. *Knott*. (2)]

Dicey, Q.C. (*Henry Lynn* with him), for the respondent. The

(1) By 16 & 17 Vict. c. 34, s. 2, income-tax is made payable for and in respect of profits and gains (by Schedule E) "for and in respect of every public office or employment of profit."

By s. 51: "In assessing the duty chargeable under Schedule E of this Act in respect of any public office or employment where the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of such office or employment the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties of his office or employment, it shall be lawful to deduct from the amount of the said salary, fees, and emoluments to be assessed under this Act the amount of all such expenses and disbursements necessarily incurred and defrayed in manner aforesaid."

By 5 & 6 Vict. c. 35, s. 45: "The profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name or of her trustee."

(2) 2 Reports of Tax Cases (Part XXXIII.), p. 246.

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deduction was rightly allowed. Schedule D is applicable, not Schedule E. It is wrong to assess the husband on the whole amount, for a part of the income must necessarily be earned by the wife, and the effect must be to reduce the husband's income below 150*l*. If two persons who were not husband and wife were in receipt of this joint income, one of them could not be taxed on the whole, and the fact that here the two persons are husband and wife makes no difference. The clause in 5 & 6 Vict. c. 35, s. 45, which has been referred to, does not apply. At the time when that Act was passed the earnings of a married woman became the property of her husband; but now, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 2, such earnings would be her separate property.

POLLOCK, B. The facts are extremely simple. The respondent, George Harding, is the master of a national school, and in respect of that office of national schoolmaster, held by him, and of the office of national schoolmistress held by his wife, he receives, or they receive, a joint salary of 150*l*. a year. I need not follow out the rest of the figures because they merely indicate certain deductions that are made before the taxable amount is arrived at. But the question is, first, what is the amount? It is beyond all doubt a joint salary paid for the services of Harding and his wife. I will not pause to consider whether there would or would not be any real distinction if they were treated as two persons who were unmarried, because in the present case it is perfectly clear that the salary is joint in language and in intention, and probably it would be impossible to do what Mr. Dicey suggests, namely, to ascertain how much is attributable to the services of the husband and how much to the services of the wife. Any one who has had practical experience in choosing schoolmasters and schoolmistresses and officers of that kind, knows that a great many considerations enter into the question. The advantage of having a married man, the advantage of having a married woman, and the different questions that enter into the elements of that proposition are numerous, and all tend, as does the language itself, to clearly shew that this is a joint salary. Then that being so, it clearly is a salary which under Schedule E

is taxable as being derived from a public employment. I have no doubt about it. It is a public office or employment within the meaning of s. 51 of the Act of 1853, and I say it is a public office or employment, because the salary is paid by persons whose position and duty to manage the school is recognized by Act of Parliament and Orders in Council; it is paid out of sums of money principally contributed from the taxes for the making of such payments, and it is in order that they may discharge a duty which is recognized as a part of the public service of the country, whereby certain schools before the School Board Act were managed and governed, and a scheme was made for the appointment of such officers, and for their payment and the mode of their payment, and also for the public education of scholars from the parents of whom a portion of the funds of the schools arise. The next question is what is the proper construction of 5 & 6 Vict. c. 35, s. 45: "The profits of any married woman living with her husband shall be deemed the profits of the husband and the same shall be charged in the name of the husband." Now this is apart from any question under the Married Women's Property Act; for the purposes of taxation and assessment the statute provides that this is to be so, it provides that "the same shall be charged in the name of the husband, and" (negatively) "not in her name or of her trustee." Then the exemption claimed is in these words: Under s. 51 of the Act of 1853 it is provided that from "the salary, fees, or emoluments of such office or employment" certain expenses may be deducted, and the earlier part of the section gives a sort of analogy as to the class of expenditure which is intended to be included within the Act, that is "the expense of travelling in the performance of the duties, or of keeping or maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties of his office or employment." Can it be said that because the wife, who would otherwise possibly or probably be engaged in looking after the household affairs of her husband, is unable to look after those affairs by reason of her devoting her time to earning this salary in question, can it be said that because that state of things exists he or she is expending money wholly, exclusively,

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and necessarily in the performance of the duties of their office or employment? The case, no doubt raises a very remarkable state of things, a state of things of which one may regret the existence. But when we apply the spirit of the Act as well as the language of it, it seems to me to be wholly nullifying the intention of the Act that any such deduction should be made. When a man and woman accept an office there are certain detriments as well as profits, but this is in no sense an expenditure which enables them to earn the income, in the sense of its being money expended upon goods, or in the payment of clerks, whereby a tradesman or a merchant is enabled to earn an income. It is merely that which is derogatory to their income, a disturbance of their income, a deprivation of a portion of their income in order that they may accept the office. If we were to go into these questions with great nicety, we should have to consider the district in which the person lives, the price of meat, and the character of the clothing that he would require, in many places indeed the character of the services and the wages paid to particular servants, and the style in which each person lives, before we could come to any conclusion. It seems to me unnecessary and foreign to the present question to go into any of these elements. It is enough to say that both within the spirit and the language of the Act this is a deduction that cannot be made, and I must say with some regret that I have come to the conclusion that the decision of the commissioners was wrong and that this is a taxable amount.

CHARLES, J. I am of the same opinion. The first question is whether the office of national schoolmaster is a public office within the meaning of Schedule E; I think it is. The facts with regard to the details of the employment are not fully stated, out enough is shewn, I think, to enable the Court to be satisfied that the office in question is a public office. That being so, the only deductions allowed are those prescribed by the 51st section of the Act of 1853, those deductions being expenses necessarily incurred, amongst other things the expenses of travelling in the performance of the duties of the office, or money laid out wholly exclusively and necessarily in the performance of the duties. Now

can it be said that the board and wages of the servant in this case are money laid out by the schoolmaster wholly exclusively and necessarily in the performance of the duties of his office? It appears to me to be perfectly plain that this is not money laid out in the performance of those duties necessarily, although perhaps he might have been unable to accept the employment at all, unless he had made some arrangement of the kind. I do not think, therefore, it can be said that this is an authorized deduction from the amount of the income. Then another ingenious argument was presented to us, and that is that the salary received by the master here, being described as joint salary, is really not a taxable profit, and the real meaning of the arrangement which the managers of the school made with him is this, that he is to be paid only a part of the 150*l.* a year, and his wife is to be paid another part, not necessarily 75*l.* each; but his wife is to be paid a part at all events of the 150*l.* If Mr. Dicey is right, even to the extent of 10*l.*, then the master's income would fall below the taxable limit; but I cannot come to any such conclusion in this case. It seems to me that this salary is paid by the managers to the master. True it is described as joint salary, but I am unable to say whether any or what proportion is to be attributed to the wife, and whether any or what portion is to be attributed to the husband. It is suggested that since the Married Women's Property Act of 1882, her portion whatever it is, whether 75*l.* or 10*l.*, is her own money and not part of a taxable income. I cannot say that any part is joint salary belonging to her in that sense; it is joint salary paid through the managers to the husband for the services of husband and wife. It is suggested that Schedule D should be applied in this case and not Schedule E. All that I have to say with regard to that is that I very much doubt whether Schedule D would assist the respondent in this case; but I am clear, for the reasons which I gave at the beginning of my observations, that the case falls within Schedule E and not within Schedule D.

Danckwerts, for the Crown, asked for costs.

Dicey, Q.C. The case of *Sowrey* v. *Harbour Mooring Commis-*

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sioners of King's Lynn (1), a case in which, as here, the Crown appealed successfully against the decision of the commissioners, is a precedent against awarding costs to the Crown as against a respondent who appears to support a decision of the commissioners in his favour. Moreover, in the present case there is a recommendation of the commissioners in the respondent's favour as to the question of costs.

POLLOCK, B. I cannot agree with the view that, because this is an appeal from the commissioners, therefore any rule as to costs must be varied for that reason alone. Under the circumstances of the present case there will be judgment for the Crown without costs; but this must not be taken as a decision that whenever there has been a decision of the commissioners in favour of a respondent costs are not to be allowed in the ordinary way. I do not acquiesce in the view suggested on behalf of the respondent.

CHARLES, J., concurred.

Appeal allowed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Baker & Nairne.*

(1) 2 Reports of Tax Cases (Part XXXI.) p. 201.

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LANGSTON (Surveyor of Taxes), Appellant; GLASSON, Respondent. 1891 *Feb.* 6.

Revenue—Income Tax—Office or Employment of Profit—Necessary Officer of Collegiate Body—Bursar of College—Income Tax Act, 1842 (5 & 6 *Vict.* c. 35), *s.* 146, *Sched. E.*

The statutes of a college, after declaring that the college should consist of a president, fellows, and scholars, provided for the appointment by the president and fellows of a bursar, and gave them power to regulate the conditions of tenure and the powers, duties, and emoluments of the office; a further statute provided that the college seal should not be affixed to any act or document except in the presence of (among others) the bursar. The respondent was appointed bursar of the college in accordance with the provisions of the statutes at a salary which was fixed by the president and fellows and was paid to him out of the ordinary corporate revenues of the college without any deduction in respect of income tax:—

Held, that the respondent, not being a member of the corporate body, although a necessary officer of the college, was liable to direct assessment to income tax upon the amount of his salary, as holding an office or employment of profit within the meaning of Sched. E. of the Income Tax Act, 1842.

Case stated by Commissioners of Income Tax under 43 & 44 Vict. c. 19, s. 59, on the application of a surveyor of taxes. The following were the material facts.

The respondent was the principal bursar of St. John's College, Oxford, and appealed to the commissioners against an assessment of 450*l.* under Sched. E of 5 & 6 Vict. c. 35, being the amount of his stipend as bursar.

By 5 & 6 Vict. c. 35, s. 146, it is enacted that the duties thereby granted contained in Sched. E shall be assessed and charged under certain rules, which rules are to be deemed and construed as part of the Act, and to refer to the said duties as if the same had been inserted under a special enactment. Rule 1 provides that the duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Sched. E. or to whom the annuities, pensions, or stipends mentioned in the said schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions after deducting the amount of the duties or other sums payable or chargeable on the same

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by virtue of any Act of Parliament where the same have been really and bonâ fide paid and borne by the party to be charged. Rule 3 provides that the said duties shall be paid on all public offices and employments of profit of the description thereinafter mentioned within Great Britian, viz. (inter alia), "any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate, any office or employment of profit under any public institution, or on any public foundation, of whatever nature, or for whatever purpose the same may be established."

On the hearing of his appeal the respondent (Mr. Glasson) put in a copy of the statutes made in 1881 for St. John's College by the Oxford University Commissioners, acting in pursuance of the Universities of Oxford and Cambridge Act, 1877; of which the following portions are material to the present case. By stat. 1 (Constitution of the College) it is provided that "The college shall consist of a president, fellows, and scholars." Stat. 4 (Officers of the College) provides by s. 1 that "The officers of the college shall be the vice-president, two deans of arts, a bursar or bursars, tutors, lecturers, and librarian. If there are more bursars than one, one of them shall be called the principal bursar." By s. 2, "The president and fellows, at stated general meetings, may from time to time institute such new offices as may be reasonably necessary for the better management of the affairs and estates of the college, and the instruction and discipline of its members; and may suppress any of such offices which may from time to time become unnecessary, and may assign to such new offices such reasonable stipends or emoluments as they shall think proper; and may from time to time regulate the conditions of tenure, and the powers, duties, and emoluments as well of such new offices as (subject to the provisions of these statutes) of the existing offices. By s. 3, "The officers of the college, with the exception of the tutors and lecturers, shall be elected by the president and fellows at stated general meetings, and for periods not exceeding in any case five years." Stat. 10 (Internal Regulations), s. 2, provides that "The president and fellows may from time to time make and vary regulations re-

specting the custody and use of the muniments, plate, and common seal of the college; but such regulations shall be made or varied at stated general meetings only: Provided that the seal of the college shall not be affixed to any act or document, except in the presence of the president (or in his absence the vice-president), one of the bursars, and at least one other fellow."

The respondent was duly elected principal bursar in accordance with the college statutes in April, 1889, at a salary of 450*l.* a year.

The respondent also put in a statement in which he claimed exemption on the ground that, though not actually a member of the corporation of the college, his salary was "by statute" a charge on the revenues of the corporation, and was therefore exempt from direct assessment. He further stated that he received the same allowances for buttery charges, &c., as members actually on the foundation. A copy of the General Instructions to Surveyors of Taxes, 1886, issued by the Board of Inland Revenue, was also put in by the respondent. No. 260 of these instructions is as follows: "The members of a capitular or collegiate body are not liable to direct assessment in respect of sums which they are as members of the corporate body legally entitled to receive out of the taxed income of the corporation. Salaries paid out of such income to persons who are not members are however chargeable by direct assessment, unless they are a charge by statute or otherwise on the revenue of the corporation."

The surveyor contended in support of the assessment that the office of bursar not being held by a fellow or any person on the foundation of the college was an office or employment of profit held under a society corporate, and as such fell within rule 3 of 5 & 6 Vict. c. 35, s. 146, and further that the college had no power to deduct, and did not deduct, income tax from the bursar's stipend.

The commissioners found (1.) that Mr. Glasson was not on the foundation of the college, but (2.) that his stipend was charged by the statutes of the college on the corporate revenues of the college, and having regard to the official interpretation of the law expressed by the Board of Inland Revenue in the instructions

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to surveyors, they held that the stipend was not directly assessable, and allowed his appeal, but stated a case upon the application of the surveyor of taxes.

Danckwerts, (Sir *E. Clarke*, S.-G., with him), for the appellant. The respondent is admittedly not a member of the corporation; he is simply an officer of the college, who is paid a stipend fixed by the president and fellows, which is the only provision as to his salary to be found in the statutes. It is true that his stipend is paid out of the college funds as part of the necessary expenses of carrying on the college, but in no other sense can it be said to be charged on the corporate revenues. The position of the respondent is analogous to that of a steward appointed by a gentleman to manage his money affairs, or of a town clerk appointed under the Municipal Corporations Act, whose salary is paid by the borough treasurer out of the borough funds, but is nevertheless directly assessable to income tax.

A. P. Poley, for the respondent. The respondent is not a mere officer of the college; he is a necessary and integral part of the corporation; for by statute 10 the corporate seal can only be affixed to a document if he is present. The old Latin statutes, which are still in force by virtue of statutes 4 and 22, so far as regards the tenure of the office of bursar, shew that the bursar's salary is chargeable on the corporate funds, for with regard to his salary they use the expression "a collegio recipiat."

[CHARLES, J. That applies only to the tenure of office of the then existing bursar; the respondent's is a new appointment.]

The bursar could not sue for his stipend, for he has entered into no contract; he is a part of the corporation, as being a necessary adjunct, and his only remedy if his stipend were not paid would be to get a receiver appointed of the college revenues. The college is assessed on profits under Sched. D in addition to being assessed under Sched. A, and has already paid income tax on this very sum.

Danckwerts, in reply.

POLLOCK, B. This is an appeal upon the part of the Crown upon an exemption allowed by the commissioners in favour of the

respondent, who held the office of bursar of St. John's College, Oxford, and that exemption was allowed, to use their own language, "because his stipend was charged by the statutes of the college upon the corporate revenues of the college"; and the commissioners added that they had regard to the official interpretation of the law expressed by the Board of Inland Revenue, to which I will call attention shortly, and which ought not to form the ground of decision either of the commissioners or of the Court. The question for us is whether the deduction is admissible, and I have come to the conclusion that it is not. The bursar of St. John's College, Oxford, comes within the language of statute 4 of the College Statutes of 1881, which relates to the officers of the college, and the 1st section of which provides that "the officers of the college shall be the vice-president, two deans of arts, a bursar or bursars, tutors, lecturers, and librarian"; then by s. 2 power is given to the president and fellows to regulate these offices, and it is provided that "they may from time to time institute new offices, and they may suppress offices, and they may assign to such new offices such reasonable stipends or emoluments as they may think proper, and they may from time to time regulate the condition of the tenure and the powers, duties, and emoluments as well of such new offices as (subject to the provisions of these statutes) of the existing offices." Now the respondent was appointed in 1889, long after the promulgation of these statutes, and the clause as to existing offices therefore does not apply; he therefore receives such stipend as the president and fellows of the college at their general meeting consider to be the proper stipend. It is true that reference may be made, as has been done by the respondent's counsel, to the original Latin statutes of the college with regard to the position and payment of the bursar; but the only point that throws any light upon his position is the expression with regard to his stipend, "a collegio recipiat." Looking, however, at the collocation of these words, and seeing that there are several other officers who are to be paid in like manner, they do not by any means shew that the respondent is one of the body constituting the college. If he were one of the body in the sense that he was one of those who had the power of dividing among themselves

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the college revenues, then he would not be an officer in receipt of a salary, but he would be receiving that which fell to his lot as one of that college body. It is clear to me, however, both from the original statutes and from those of 1881, that he is an officer in the sense that he is appointed by the president and fellows and that he receives a salary for the discharge of his duties.

That being the state of facts as regards the position of the respondent, we find, on reference to s. 146, sub-s. 3, of the Income Tax Act, that "the duties paid upon all public offices and employments of profit of the description hereinafter mentioned within Great Britain shall be as follows," the words applicable to the present case being "any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate." The present case comes strictly within that definition, and in substance also it is within it, and therefore I think that the respondent is liable to pay this income tax just as though his salary were paid to him by some other corporation or by a private individual.

It was suggested, on behalf of the respondent, that we ought to see whether income tax was paid upon the bursar's salary by the college itself; but, in truth, that is really foreign to the present inquiry. A corporate body pays income-tax upon the funds belonging to it as a corporate body, and the constituent members of the corporation are merely those persons who go to form the body; the funds belong to the corporation solely in its capacity as a corporate body, and not to the individual members, and are dealt with accordingly by the Income Tax Act.

One other suggestion was made on the respondent's behalf: that as a fact he gets his pay from the college and out of the college revenues. That is true, in the sense that he is employed by the college and gets his salary from it, though whether an action for his salary would lie against the college or against the individuals appointing him is wholly immaterial; but it is not true in the sense that he receives his pay as one of the corporate body entitled to a share of the college revenues.

It is said that our decision involves a hardship upon the

respondent, because of the direction given by the Board of Inland Revenue to their officers, which is in these words: "The members of a capitular or collegiate body are not liable to direct assessment in respect of sums which they are as members of the corporate body legally entitled to receive out of the taxed income of the corporation. Salaries paid out of such incomes to persons who are not members are however chargeable by direct assessment unless they are a charge by statute or otherwise upon the revenue of the corporation." That really raises the only point raised here to day. If we could find that the respondent was a member of the collegiate body, and was merely taking his share of the collegiate property, then he would not be liable to be taxed; but if he merely receives a salary paid out of such income, then there seems no hardship arising from the direction, for anyone construing the direction with reference to the legal status of the parties would have no difficulty in saying that the respondent came within the second category and not the first. But that is not a question of law at all, and I only allude to it because it formed part of the ground of the decision of the commissioners. Upon the whole, therefore, I am clearly of opinion that this assessment is incorrect, and that the appeal must be allowed.

CHARLES, J. I am of the same opinion. The assessment is made under Sched. E of the Income Tax Act, which directs an assessment "for and in respect of any public office or employment of profit," and, upon reference to the rules in accordance with which that assessment is to be made, it is quite clear that the office of bursar of St. John's College, Oxford, is a "public office or employment of profit" within Sched. E. It is scarcely contended indeed that it is not in itself an office of this description, but exemption is claimed upon the ground that, although the bursar is not a corporator, still, inasmuch as his is an office necessary for the proper performance of the corporate duties, he is therefore to be exempt. Now he is not a corporate officer—a corporator—that is clear; but he is an essential officer of this college because by the 10th statute it is enacted that "The president and fellows may from time to time make and vary

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regulations respecting the custody and use of the muniments, plate, and common seal of the college; but such regulations shall be made or varied at stated general meetings only: Provided that the seal of the college shall not be affixed to any act or document except in the presence of the president (or in his absence the vice-president), one of the bursars, and at least one other actual fellow;" and it is contended that as he is a necessary person for the performance of the corporate duty, he ought to stand upon the same footing as if he were a corporator, and ought not to pay income tax upon his salary. It is further said that the old statutes apply to the case, that he could maintain no action for his salary, but could only institute proceedings against a receiver of the college funds if payment of his salary were withheld from him. I do not myself think that the old statutes apply to the respondent, for he was only appointed in 1889. It is true that the 22nd statute of the statutes of 1881 preserves all rights which had come into existence under the statutes thereby repealed; but as the respondent came into office after the promulgation of the new statutes, he seems to me to be a person the tenure of whose office is regulated exclusively by statute 4 of the new statutes, which enables the president and fellows to regulate the conditions of tenure, powers, duties, and emoluments of officers. It seems to me, therefore, that they had power to make what conditions they pleased with reference to his tenure of office, and had power to assign him what emolument they pleased. They did assign him a stipend of 450*l.* a year, and it is a point in the case stated by the commissioners, although it has been stated to us that it was never actually taken, that the college has no power to deduct income tax from the bursar's stipend, and does not as a fact deduct it. The money is, therefore, paid to him as stipend in the same way as a stipend is paid to the librarian, neither of them being members of the corporation, and there is in my opinion nothing to take the respondent's stipend, his office being a public office, out of the operation of Sched. E of the Income Tax Act. It is suggested that the Crown will thus receive income tax twice, because the money has already paid the tax in the hands of the corporation itself. If this be so, and it seems to be by no means impossible

in this case, it certainly ought not to be so, for s. 54 of the Act of 1842 provides that officers of a corporation are to prepare statements of their profits and gains, and that "Nothing hereinbefore contained shall be construed to require in such statement the inclusion of salaries, wages, or profits of any officer of such corporation, fraternity, fellowship, company or society otherwise chargeable under this Act." We think that the respondent is an officer chargeable under Sched. E, and that being so there was no necessity for the officers of the college to include the amount of his salary in the statement of their profits and gains. The Crown is, therefore, entitled to our judgment.

Judgment for the appellant.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondent: *Sheldrake.*

W. J. B.

DILLON (SURVEYOR OF TAXES), APPELLANT; CORPORATION OF HAVERFORDWEST, RESPONDENTS. *Feb. 5.*

Revenue—Income Tax—Deductions—Money laid out or expended for Purposes of Trade—Municipal Corporation—Duty to Light Town—Power afterwards to supply Gas to Private Customers—Profits from Supply of Gas—Expenses incurred in Lighting Town—5 & 6 *Vict. c.* 35, *s.* 60, *Sched. A; s.* 100, *Sched. D.*

By a local Act the duty was imposed upon the respondent corporation of lighting a town with gas, and the Act further provided that it should be lawful for the respondents, after lighting the town, to supply private customers with gas. The respondents, from the supply of gas to private customers, earned profits, on which they were assessed to income tax. They claimed to deduct from these profits the expenses incurred in lighting the town, as being money wholly and exclusively laid out or expended for the purposes of a trade, within the meaning of 5 & 6 Vict. c. 35, s. 100, Sched. D, r. 1, of the rules applying to the first and second cases:—

Held, that the lighting of the town and the supply of gas to private customers were separate and distinct operations; that no trade was carried on until the respondents, after having lighted the town, began to supply gas to private customers, and therefore the expenses incurred in lighting the town were not money laid out or expended for the purposes of a trade, and the deduction could not be allowed.

CASE stated for the opinion of the Court under 43 & 44 Vict. c. 19, s. 59.

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The respondent corporation had appealed to the district commissioners against an assessment on 550*l.* 10*s.* in respect of the profits of their gasworks, from which, after supplying gas for lighting the public lamps of the town of Haverfordwest in accordance with the provisions of their local Act, they supplied gas to private customers by virtue of the powers conferred by s. 56 of the same Act.

By 5 & 6 Wm. 4, c. lxxiii. (an Act for paving, lighting, and otherwise improving the town of Haverfordwest), s. 56: "In case the said commissioners shall deem it expedient to erect such gas apparatus, and to light the said streets, roads, squares, crescents, lanes, entries, passages and places, or any of them, with gas, ... without contracting for the same as aforesaid, it shall be lawful for the said commissioners, after sufficiently lighting such streets" (&c.) "to let or demise to any person or persons whomsoever, who shall be willing to take the same, any light or lights, ... and to supply the same with gas . . . . upon such terms and conditions, and at such annual rents for the same, and in such manner as the said commissioners shall from time to time think proper. Provided, nevertheless, that all money to arise therefrom shall be in the first instance applied towards defraying the expenses of the said gas apparatus and other things connected therewith; and if there shall be any overplus, then the same shall be applied generally for the purposes of this Act."

By s. 96 of the same Act, the commissioners were empowered to make rates for the purposes of the Act; but, as stated in the report to the abstract of accounts annexed to the case, no rate was made for lighting purposes, the profits from the sale of gas to private consumers being sufficient to defray both the charge for "sinking fund" and the expense of lighting the public lamps.

The powers conferred by the above Act on the commissioners therein named are now vested in the respondent corporation.

The clauses in the Income Tax Acts which are material to the case are set out and discussed in the judgments.

The question for the opinion of the Court was, whether the district commissioners were right in holding that the expenses incurred in manufacturing gas for and lighting the public lamps

were allowable as a deduction from the receipts of the corporation from the sale of gas to private consumers.

Danckwerts, (*Sir Edward Clarke, S.G.*, with him), for the Crown, in support of the appeal. The deduction was wrongly allowed. The decision of the district commissioners can only be supported by holding that the performance of the public duty, imposed upon the respondents by their Act of Parliament, of supplying gas to light the public lamps, and the supply of gas to the inhabitants, which the Act allows but does not compel them to undertake, provided they have previously carried out the beforementioned public duty, together constitute one concern, and that the corporation are carrying on a trade throughout. This is incorrect, for in performing the duty of supplying gas for the public lamps they are not carrying on a trade, and can make no profits. They cannot trade until there is someone for them to trade with, and this state of things first arises when they begin to supply gas to private consumers. The two operations are separate and distinct. The one is the performance of a public duty, from which no profits do or can arise, and the other is the carrying on of a trade by supplying private customers which results in profits. It follows that it is wrong to allow the expenses incurred in the performance of the public duty to be deducted from the profits realized in the course of a trade which is voluntarily carried on. The Scotch case of *Miller* v. *Glasgow Corporation Water Commissioners* (1), and the Irish case of *Corporation of Dublin* v. *McAdam* (2), are both in point, and support the contention on behalf of the Crown.

Gore, for the respondents. The Scotch and Irish cases referred to are not in point, for in neither of those cases was there any argument as to the mode of making the deductions. The statute prohibits the supply of private customers until the public streets have been lighted, and therefore as the profits arising from the supply of gas to customers could never have been earned without incurring the expenses which the respondents now claim to deduct, those expenses are money wholly and exclusively laid

(1) 23 Scottish Law Reporter, 285; 13 Court Sess. Cas. 4th Series, 489.
(2) 20 L. R. Ir. 497.

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out or expended for the purposes of trade within the meaning of 5 & 6 Vict. c. 35, s. 100, Sched. D, r. 1, of the rules applying to the first and second cases, and are rightly deducted. In *Mersey Docks* v. *Lucas* (1), Lord Selborne, L.C., dealing with 5 & 6 Vict. c. 35, s. 60, Sched. A, No. 3, under which the present respondents are assessed, said: "The tax is to be upon the profits, as I said before, of the year preceding, and it is to be charged, amongst others, upon every 'corporation' 'carrying on the concern,' and it is to be charged 'on the amount of the produce or value thereof.' What is 'thereof'? Of the concern which the corporation carries on." The concern which the corporation carries on in the present case is the lighting of the streets and the supply of customers combined. The money which they receive is applicable to a public, or quasi public, purpose, and ought not to be made liable to income tax.

[He also referred to *Attorney General* v. *Black* (2); *Russell* v. *Town and County Bank*. (3)]

POLLOCK, B. This is an appeal against a decision of the Assessment Commissioners, who have come to the conclusion that the corporation of Haverfordwest, who are the respondents were entitled to make a certain deduction before they became liable to what has been called "profits" under the Income Tax Acts.

The condition of things was this. The corporation of Haverfordwest, by an Act passed in 1835, have power (by s. 56) to erect gas apparatus and to light the streets and other roads without contracting for the purchase of gas. They have also additional powers to work the same works for the purpose of supplying any persons who are willing to buy their gas, and to receive payment for it, always provided that they are not to sell the gas to other persons until they have complied with their duty under the first portion of the section, namely, to supply the public lamps.

Upon that state of things, they, having rendered their accounts, were charged in this wise in the public account:

(1) 8 App. Cas. 891, at p. 903. (2) Law Rep. 6 Ex. 78, 308.
(3) 13 App. Cas. 418.

upon the gas that they manufactured for the public account there would be, and could be no profit; but upon the gas which they supplied on the private account to consumers to whom they sold gas, there was, upon that account taken separately, a profit, and in the first instance they were assessed upon that profit. They appealed successfully to the Assessment Commissioners, and now the Crown appeals to this Court.

The conclusion I have come to is that this appeal must succeed, and for these reasons. The statute under which the respondents are assessed is the statute under which the profits of all persons making gas are assessed, and that is under 5 & 6 Vict. c. 35, s. 60, Sched. A, r. 3, by which "the annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times herein limited," and it applies by sub-s. 3 to gasworks, and therefore it is as the owners and workers of their gasworks that the corporation are assessed. Now, the provision with regard to any deduction is this, it comes within Sched. D, cases 1 and 2. "In estimating the balance of the profits or gains to be charged according to either of the first or second cases no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." Now, it is quite clear to my mind that anything expended upon the first-mentioned duty, namely, the supplying of the town, was not expended for the purposes of that trade in respect of which they were assessed, and the reason I say that is this. Here is a body which is bound to provide for the lighting of the town. They may buy the gas or they may make it. They elected to make it, and that has to be paid for by a rate upon the town. They are in no sense traders. There are no vendors, and there are no vendees. I take what is perhaps a better expression, according to the judgment of Palles, C.B., in the Irish case of the *Corporation of Dublin* v. *McAdam* (1), they were in the position of principal and agent—that is to say, they were the agents to make

(1) 20 L. R. Ir. 497.

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for their principals, the people of the place, gas, and to supply it, and then those who got the benefit of it were rated accordingly. So long as that continued no trade could arise: there was no vendor, no vendee, no trade was carried on. But they had beyond that, by s. 56 of their private Act, an option to do more—that is, the section provided that it should be lawful for the commissioners after sufficiently lighting the streets, roads, &c., of the town, to let to any persons, whosoever should be willing to take the same, any light or lights, or to sell any gas. That being so, they choose to act upon that, and they do make gas, and they do sell it, and immediately thereupon there is a vendor and a vendee, a trade arises, and profits for the first time arise from that trade.

Now, it seems to me that this case is tolerably clear when one sees what is the real meaning of this section in the private Act, and whether in truth it really does come within the decisions to which our attention has been called: first, in the *Glasgow Case* (1), and secondly, in the case to which I have already alluded. In the *Glasgow Case* (1), the Glasgow Corporation Water Commissioners were held to be liable to an assessment in respect of revenue derived from supplying water beyond the area of compulsory supply, and from the sale of water for the purposes of trade. I will not follow or more fully go into the discussion and the judgment in that case, because I think the point is perhaps rather more clearly argued out, and certainly more clearly discussed, in the judgment of Palles, C.B., in the case of the *Corporation of Dublin* v. *McAdam* (2). What he says there with regard to so much of the water as is supplied within the area is this: "I think the true ground of decision is that the body to pay is a distinct and separate body from the body to receive; that the relation between the two bodies is that of vendor and purchaser of water—as in the case of municipal inhabitants, it is that of principals and agents in respect of that supply." (3) Then, later on, he returns to the same mode of argument, and says that to his mind it is clear that no trading arises until a

(1) *Miller* v. *Glasgow Corporation Water Commissioners*, 23 Scottish Law Reporter, 285; 13 Court Sess. Cas. 4th Series, 489.

(2) 20 L. R. Ir. 497.

(3) 20 L. R. Ir. 512.

supply is given to those who are beyond the boundary. Now, all that argument applies very strongly to the present case, and perhaps more strongly from the special wording of the section under which the corporation are empowered to sell the gas. Upon the other side it has been argued that the whole thing was to be looked at in one light; that we must look at this as if it were a trading body, created by Act of Parliament, to which the law has established a sort of drawback. That meant, that they must not do certain things—that is to say, they must not supply private inhabitants until they supply the public lamps, and therefore, when they make up their accounts, if they find they do make profits upon the private supply, they must look back and see whether they have a loss upon the public supply, and then deduct that loss from the profits. But I think I have already answered that proposition by shewing that no profit arises until the corporation for the first time begin to furnish a private supply, which they do, not by compulsion, but voluntarily. That seems to me to dispose of that argument.

There is one other observation which requires very little to be said upon it—that is, whether when this profit is made it is not to be looked upon as money which is applicable to a sort of public or quasi public purpose, and therefore, that it is not a proper subject-matter of income tax. In dealing with that part of the case, Palles, C.B., in *Corporation of Dublin* v. *McAdam* (1), cites the case of the *Mersey Docks and Harbour Board* v. *Lucas* (2), and he says: "In making that decision Lord Selborne almost apologised for giving his reasons, as in substance the question had been decided twenty years before by the House of Lords in the cases of the *Mersey Docks* v. *Cameron* (3), and *Jones* v. *Mersey Docks*." (3) Those decisions shew that it was a false argument to say that there was something like a deduction by statute of this money, which prevented the corporation applying any portion of it to the payment of income tax. They are a corporation, but they are nevertheless for this purpose a trading company, and these sums, whatever may become of them ultimately, are not the less profits by reason of their ultimate destination.

(1) 20 L. R. Ir. 497, at p. 515. (2) 8 App. Cas. 891. (3) 11 H. L. C. 443.

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Upon these grounds this appeal must succeed, and the assessment must stand as passed.

CHARLES, J. This assessment is made upon the respondents under the provisions of Sched. A and Sched. D of the Income Tax Act, 1842. Sched. A provides for the mode of assessing the owners of gasworks. By r. 3, it enacts that "The annual value of all properties hereinafter described" (and gasworks are thereinafter described) "shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times herein limited."

Then by a later Act of Parliament, 29 & 30 Vict. c. 36, it is enacted by s. 8 that "The several and respective concerns described in No. 3 of Sched. A of 5 & 6 Vict. c. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. 3 mentioned according to the rules prescribed by Sched. D of the said Act, so far as such rules are consistent with the said No. 3." The effect of that is this: not to transfer the concern in question, the gasworks, bodily from Sched. A to Sched. D, when a number of consequences would follow which do not follow as matters at present stand, but to leave the concern in Sched. A, No. 3 providing that, so far as these rules are consistent with No. 3, the rules prescribed in Sched. D are to govern. Therefore, the one year interval, for example, is to remain; and the three years' interval is not substituted for it; but although that is so, in order to find out what deductions are to be allowed, I think we must turn to the rules mentioned in Sched. D. The first rule applicable in the first and second cases of Sched. D is this: "In estimating the balance of profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever not being wholly and exclusively laid out for the purposes of such trade, manufacture, adventure, or concern." In this case the corporation have parliamentary authority. The corporation and their predecessors in title, the commissioners mentioned in 5 & 6

Wm. 4, c. lxxiii., had statutory authority to light the public lamps within the borough, and they are empowered by the 56th section of that Act of Parliament, after sufficiently lighting the streets, roads, squares, crescents, lanes, entries, &c., to let or demise to any person or persons whomsoever who shall be willing to take the same any light or lights. In other words, as soon as they have performed the parliamentary duty with which they are entrusted of lighting the public streets, they are at liberty to sell gas to private consumers. It seems to me that the trade they carry on is the trade of supplying gas to private consumers. Their operations, so far as the public streets are concerned, are not operations carried on by them as a trade at all, but, as was pointed out by Palles, C.B., in the very analogous case of the *Corporation of Dublin* v. *McAdam* (1), their operations were not carried on by way of trade, but were operations carried on for the purpose of supplying themselves with gas. Now people cannot trade with themselves; and therefore I do not see in any sense how this corporation can be held to carry on a trade, so far as their duty of lighting the public streets is concerned. They begin to be tradespeople as soon as they have got customers, and their customers are those who choose to contract with them to take their gas.

Then it is said that nevertheless this deduction which is now claimed is allowable. The exact nature of the deduction is this. It is the expense incurred in lighting the public lamps. That is the nature of the deduction—an expense, therefore, incurred in the discharge by the commissioners or the corporation of their public duties, and it is said although that is so, it is wholly and exclusively laid out for the purposes of the trade of the corporation, and Mr. Gore argued it in this way. He said that under s. 56 a private customer cannot be supplied without this expense being incurred, because it is only after they have sufficiently lighted the streets that the corporation may supply gas to private customers. Upon reflection, I am not able to assent to that way of putting the case. I think the expenditure in question is not an expenditure for the purposes of the trade in question, which I think was a trade of supplying the private customers

(1) 20 L. R. Ir. 497.

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only, but an expenditure for the purpose of enabling the corporation to enter upon that trade, which is a very different matter. That the Act of Parliament provides that the expenses incurred for the purposes of trade are to be deducted does not indicate that the initial expenditure to enable a person to enter into a particular trade is to be deducted from the amount of profits which he earns in that trade.

I therefore come to the conclusion that the deduction clause cannot be relied upon by the respondents, and I may add that the two cases of the *Corporation of Dublin* v. *McAdam* (1), and *Miller* v. *Glasgow Corporation Water Commissioners* (2), seem to be both authorities for the same conclusion. It is true that in neither case was there any argument as to the exact mode in which deduction had been made; but in both cases there equally was an apportionment of the expenditure deducted. In the *Dublin Case*, Palles, C.B., says he cannot say anything about the mode in which the deductions shall be made, because the matter has not been fully brought before him; but in the other case it is perfectly plain from the accounts printed in the case that the mode adopted was only to set against the profits made by what I will call the outside expenditure, the expenses incurred in earning that outside profit. Upon principle, therefore, and also upon these authorities, I think our judgment ought to be for the Crown.

Appeal allowed with costs.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Peacock & Goddard.*

(1) 20 L. R. Ir. 497.
(2) 23 Scottish Law Reporter, 285; 13 Court Sess. Cas. 4th Series, 489.

P. B. H.

CAWSE *v.* THE COMMITTEE OF THE NOTTINGHAM LUNATIC HOSPITAL.

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Feb. 6.

Revenue—Landlord's Property Tax—Inhabited House Duty—Exemptions—"Hospital"—5 & 6 Vict. c. 35, s. 61, r. 6; 48 Geo. 3, c. 55, Sched. B, Case IV.

An institution for the reception of insane persons was founded by charitable contributions; it was partly and substantially supported by funds derived from charitable sources, having an endowment fund, and a small portion of its income being derived from subscriptions. It was vested in trustees and managed gratuitously by a committee. During the year previous to that for which the assessment was made the income derived from the payments made by patients and from the sale of produce on a farm belonging to the institution, without taking into account the income arising from the endowment fund and the annual subscriptions, exceeded the total expenditure:—

Held, that the institution was not wholly self-supporting merely because the income derived from the payments of patients and the sale of produce had in a particular year exceeded the expenditure, but was a hospital maintained in part by charity, and was therefore exempt from landlord's property tax and inhabited house duty, as being a "hospital" within the meaning of 5 & 6 Vict. c. 35, s. 61, r. 6, and 48 Geo. 3, c. 55, Sched. B, Case IV.

Needham v. *Bowers* (21 Q. B. D. 436) distinguished.

Case stated under 43 & 44 Vict. c. 19, s. 59, by Commissioners of Income Tax on appeal by the Committee of the Lunatic Hospital, at the Coppice, Nottingham, against an assessment of 1000*l.* made upon the committee under Sched. A, and a similar assessment for inhabited house duty for the year ended April 5, 1889.

From the statements in the case, and the documents which accompanied it, and formed part of it, it appeared that the Coppice Hospital had been carried on upon its present site for upwards of thirty years, and that hitherto the only assessment upon it, under Sched. A, had been upon the resident medical officer's house at 20*l.* a year, and that there had been a like assessment in respect of inhabited house duty. Prior to the year 1857 there had been an arrangement for the care of lunatics between the county of Nottingham, the county of the town of Nottingham, and a body of charitable persons who subscribed largely towards the carrying out of the plan. In that year the union or partnership between these bodies was dissolved with the

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sanction of the Secretary of State, and the assets were divided, a sum of upwards of 27,000*l.* representing the share of what may be called the voluntary contributing parties, which sum was invested in the names of trustees for the purpose of purchasing a site and building a hospital, and for the general purposes of the proposed new hospital. A site was purchased, the conveyance of the land expressing that the purchasers (the trustees of the proposed hospital) held it "upon trust to permit and suffer the said pieces and parcels of land, and all buildings which have been or may be hereafter erected thereon, to be used and appropriated for the said proposed new lunatic hospital and the grounds thereof, for the benefit and convenience of the inmates thereof, and for no other purpose, and in such manner as the rules and regulations for the time being of the said institution shall direct." On January 2, 1858, a declaration of trust was executed of the moneys standing in the names of the trustees, by which it was declared that they held them, with the dividends, income, accumulations, &c., "upon such trusts and for such intents and purposes, and generally in such manner for the benefit of the said proposed new lunatic hospital and the inmates thereof, as a majority of the voluntary subscribers and donors to such proposed new lunatic hospital present at any meeting of such subscribers and donors, convened as hereinafter mentioned, shall from time to time order and direct."

The hospital was provided and used for the reception and relief of lunatics who were not paupers, and for whose maintenance and medical attendance sums varying from ten shillings to forty shillings a week were paid, except that about five patients paid an extra twenty shillings a week for extra room accommodation. It was further stated in the case that the institution had always been called a hospital, and had all the usual features of a hospital, having been founded and built with charitable contributions, and that it was managed by charitable persons not deriving any pecuniary benefit therefrom, but assisting it by their subscriptions. The amount of annual subscriptions was variable, and appeared from the accounts to range between 200*l.* and 575*l.* a year. There was also an endowment fund, the income from which amounted to between

400*l.* and 500*l.* a year. There was a statement in the case that reference to the annual reports for the three years ending 1887, which accompanied the case and formed part of it, shewed that the hospital was partly and substantially supported by funds derived from charitable sources. It appeared from the accounts contained in the reports that in each of the years 1887, 1888, and 1889, the receipts of the hospital, from the payments for patients and from the sales of produce on the farm belonging to it, were more than sufficient to defray the expenses of the hospital by an amount ranging from 350*l.* to 650*l.* a year.

The commissioners were of opinion that the hospital committee were within the exemption both as regards Sched. A and inhabited house duty, and discharged the assessment, but upon the application of the surveyor of taxes stated this case. (1)

Danckwerts, (*Sir E. Clarke, S.G.*, with him), for the appellant. This institution is not a "hospital" within the meaning of rule 6 of s. 61 of 5 & 6 Vict. c. 35, and is not entitled to exemption from property tax. The question is not whether the hospital was in its origin a charitable institution, but whether it is a

(1) Rule No. 6, contained in s. 61 of 5 & 6 Vict. c. 35, specifies the "allowances to be made in respect of the said duties in Sched. A," which allowances are (inter alia) as follows: "For the duties charged on any college or hall in any of the universities of Great Britain in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall, and the gardens, &c.; or on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school, or almshouse, and offices belonging thereto, and of the gardens, &c.; or on any building, the property of any literary or scientific institution, used solely for the purpose of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise, provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same."

By 48 Geo. 3, c. 55, Sched. B, Exemptions, Case IV.: "Any hospital, charity school, or house provided for the reception or relief of poor persons," is exempt from the inhabited house duty.

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charitable institution now. It is clear from the annual accounts, that without taking into account the income derived from the endowment fund or the charitable contributions of annual subscribers, the receipts from the payments for lunatics and the sale of produce were more than enough for three successive years to defray the whole of the expenditure, and the institution is now self-supporting. The endowment fund need not be called upon to aid in defraying the yearly expenditure, and the income of that fund, and the contributions of the subscribers, simply go to swell the amount of its invested property. The case is within the principle of *Needham* v. *Bowers*. (1) It is true that there is here an endowment fund, which was an element wanting in that case; but that can make no difference where the institution is self-supporting, and is not under the necessity of having recourse to the income of its endowment fund or to other charitable contributions. For the same reasons, the institution is not exempt, as being a "hospital," from the inhabited house duty.

[He also cited *St. Andrew's Hospital, Northampton* v. *Shearsmith*. (2)]

Lumley Smith, Q.C. (*W. Graham*, with him), for the respondents. This institution is entitled to exemption both from landlord's property tax and inhabited house duty. It is a "hospital," and is not a self-supporting institution, and differs in its character from the institution in *Needham* v. *Bowers*. (1) In that case there was no endowment fund, and no donations or annual subscriptions were solicited, the annual receipts from patients being largely in excess of the annual expenditure. It was there held that the language of the Income Tax Act did not apply to a hospital which was self-supporting, but must be restricted to hospitals supported wholly or in part by charity; and in this case there is a finding that the hospital is partly and substantially supported by funds derived from charitable sources. It is none the less supported in part by charity because in a particular year the receipts from the patients and the farm produce may happen slightly to overtop the actual expenditure; in fact, if this hospital is to be charged with the annual value of the occupation of the land and buildings, it is clear that it is not a

(1) 21 Q. B. D. 436. (2) 19 Q. B. D. 624.

self-supporting institution, and that, excluding the income from the endowment fund and the annual subscriptions, the accounts would each year shew a loss. Light is thrown upon the meaning of s. 61 by Denman, J., in *Blake* v. *Mayor of London* (1), where he says, "the intention seems to have been to exempt, not merely institutions which were purely charitable, but institutions ejusdem generis with the colleges and halls which form the first class of property exempted"; and this opinion was adopted by the Court of Appeal. (2) The language used by Lopes, L.J., in that case (3), is precisely applicable to this hospital; it is an institution not carried on for profit, and in which the public are interested, and in which a sufficient number of the public receive relief which is wholly or to a great extent gratuitous.

Danckwerts, in reply.

POLLOCK, B. The question in this case involves some important principles; but I think I can state in a very few words my grounds for coming to the conclusion that this, being an assessment under Sched. A of the Income Tax Act, is not an assessment that can be sustained. The hospital in question was a lunatic asylum; undoubtedly its primary object, or its original object, was the maintenance of lunatics of the poorer class; of late years undoubtedly it had become very different in the nature of its support, and very different in the class of patients that it received, in consequence of a number of paying patients who paid so well that for three years at least there was a small balance in favour of the trustees. That being so, the question comes whether this building, which was originally beyond doubt a hospital within the exemption created by Rule No. 6 of the Income Tax Act, has ceased to be so.

It is to be remembered that this is not an assessment under Sched. D of profits; if it were so, a very different consideration would arise. My own impression is that when the word "hospital" is used in rule 6 it intends to exempt any institution that is practically of the character of a hospital, and is of an eleemosynary character, and some assistance is gained by

(1) 18 Q. B. D. 437. (2) 19 Q. B. D. 79.
(3) 19 Q. B. D. 82.

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referring (as was done by Denman, J., in the case of *Blake* v. *Mayor of London* (1)) to the early clause of rule 6, where the words used are, "Any college or hall in any of the universities of the United Kingdom." It is clear that any college or hall attached to one of the universities may in consequence of bequests, or by the actual payments of those who enjoy the advantage of it, have ceased to be of the same eleemosynary character that it was originally; but it could not be argued that for that reason it should come within the province of taxation under Sched. A.

The argument most strongly urged on the part of the Crown is that which was adopted in the case of *Needham* v. *Bowers*. (2) In that case the buildings which were assessed under Sched. A, and also to the inhabited house duty, belonged to an institution for the reception of insane persons, which was founded by charitable donations but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of the payments made by the patients, of whom some paid more and some less than the cost of their maintenance, and a few were maintained gratuitously. After paying the expenses there was an annual surplus of profit, which was expended in enlarging and improving the institution. In that case the Court held that the institution, being wholly self-supporting, was not exempt as a hospital within the meaning of the exemption with which we are now dealing. We have no occasion whatever to quarrel with that decision, nor can we say that it governs the decision in the present case, because the whole force of that decision is that that hospital was supported wholly out of payments made by patients, which is very different from the facts in the present case. I think that the case of *Blake* v. *Mayor of London* (1) is more in point, and I agree entirely with what was there said by my brother Denman, that "the hospital would not be the less entitled to exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital." It may be that for a few years a hospital may flourish by reason of taking those fees; it may be that a few years hence those fees will be less; the important point to

(1) 18 Q. B. D. 437. (2) 21 Q. B. D. 436.

consider is that the original eleemosynary character of the institution is not blotted out but still exists. That is the distinction which arises between this case and the *Charterhouse Case* (1), which was decided by my brother Hawkins and myself last year.

That seems to be sufficient to dispose of the question of the income tax, except that before I leave it I will remark that this is not an assessment under Sched. D. If the profits were assessed apart from the buildings as a going concern upon which profit was derived, a very different question would arise; I do not say more than that about it, because the question is not now before us.

Now comes the question under the statute of 48 Geo. 3, c. 55, Sched. B, with regard to the claim for inhabited house duty. By that schedule the exemption is made in these words: "Any hospital, charity school, or house, provided for the reception or relief of poor persons." The same argument that I have stated with regard to the income tax seems to me to apply to this. This hospital at Nottingham, quoad the buildings in respect of which the assessment is made, has always been, and to my mind still is, a hospital provided for the reception or the relief of poor persons, and it is not the less so although considerable moneys have been received by taking in persons who can pay, and whose payments have during two or three years led to an annual balance which the trustees are enabled to invest. It seems to me, therefore, that in neither respect can this assessment be maintained.

CHARLES, J. I am of the same opinion. This is an assessment under Sched. A of the Income Tax Act, and the question for our consideration is whether the institution which is assessed falls within any of the exemptions allowed by clause 6 of that schedule. It seems to me that in order to arrive at a satisfactory answer the only question which is relevant is to ascertain what is the character of the institutions which are exempt by that clause. Now, all colleges and halls of universities are exempt, and I think that they would remain exempt even though it

(1) *Governors of Charterhouse School* v. *Lamarque*, 25 Q. B. D. 121.

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Charles, J.

was proved that in any particular year a particular college or hall had, if I may use an ordinary expression, paid its way. Then comes the exemption of hospitals, public schools, or almshouses, and it has been held with regard to public schools that those words, used as they are in connection with the word almshouse which follows them, apply to a public school which has some charitable element in its endowments. To that extent the word "public school" is to be restricted. The same thing has been held with reference to hospitals. The word itself would undoubtedly include such an institution as that now in question; but it has been decided that a hospital which has no charitable element whatever in its endowment is not within this exemption. It was held by the Court in *Needham* v. *Bowers* (1), that that particular hospital was not exempt, the only charitable thing about it being that it was started by charity, and it being in no sense endowed with charity.

The argument on the part of the Crown rests entirely upon an analysis of the accounts of this institution during the particular year in respect of which it is sought to make this assessment. Of course, in this connection we have nothing to do with the three years' limit; the one year is the only matter which we have to look at; and it is pointed out that, if the accounts are analyzed, the amount received in this particular year from paying patients and sale of produce overtops the expenditure of the institution itself; and it is urged that this is in no sense an institution maintained or supported by charity, and that not being an institution maintained or supported by charity, it falls within the principle of the case of *Needham* v. *Bowers* (1), and is liable to assessment.

The answer to that contention appears to me to be this. The question is not whether this institution does or does not in any particular year receive payments from patients which enable it to pay its way. The question is, What is the character of the institution itself? And the character of this institution differs from the character of the institution which was under consideration in the case of *Needham* v. *Bowers* (1) in this respect, that whereas in *Needham* v. *Bowers* (1) the institution was main-

(1) 21 Q. B. D. 436.

tained wholly out of the payments by patients and had no charitable endowment whatever, in this case there is a substantial charitable endowment which amounts to many hundreds a year. I think, therefore, that this institution, endowed as it is with a substantial charitable endowment, falls within the word "hospital," used in clause 6 of Sched. A. I say nothing about Sched. D, because the assessment is not under that schedule.

Then with regard to the inhabited house duty, I only desire to add one word to what my brother Pollock has said. The words in the exemption from the inhabited house duty are these: "Hospital, charity school, or house provided for the reception or relief of poor persons," and it appears to me to be clear that these words, "provided for the reception or relief of poor persons," apply to the word "house only." They certainly do not apply to a charity school; but inasmuch as the word "hospital" is used along with "charity school," and along with words indicating a poor-house, I think this exemption must be treated in the same manner as the exemption in the Income Tax Act, where the word "hospital" does not include the case of a hospital with no charitable endowment, but does include a hospital with a substantial charitable endowment. For these reasons, I think our judgment must be in favour of the respondents.

Judgment for respondents.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Field, Roscoe, & Co., for Enfield & Son, Nottingham.*

W. J. B.

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Feb. 5, 20.

Applied. BEESTON U.D.C. *v.* SMITH. [1949] 1 K. B. 656

IN RE MIRAMS.

Assignment—Validity—Public Policy—Salary of Chaplain to Workhouse—Public Officer—Salary payable out of Poor-rate.

An assignment of the salary of the chaplain to a workhouse and workhouse infirmary is not void as being against public policy.

CASE stated by the judge of the county court at Birmingham.

On October 31, 1890, Thomas Mirams, a clergyman, was adjudicated a bankrupt in the county court at Birmingham, and the same day a summary order for the administration of his affairs was made under s. 122 of the Bankruptcy Act, 1883, and the official receiver became the trustee.

The bankrupt was chaplain to the Birmingham workhouse and to the Birmingham workhouse infirmary. The joint appointment was solely in the hands of the Birmingham guardians, the chaplain being elected by a majority of votes, and the joint stipend or salary was 250*l.* per annum, and was paid out of the local rates.

The bankrupt had, on December 24, 1889, executed an assignment of his stipend in favour of W. G. Coulton, to secure the repayment of 49*l.* and interest.

The trustee contended that the assignment was void, as being contrary to public policy—(1.) because the bankrupt was a public officer holding a public appointment, and paid out of the public funds; and (2.) because he was a clerk in holy orders, and his salary was payable to him in respect of the cure of souls and the conduct of the services of the church.

The questions for the opinion of the Court were:—

First. Whether the assignment to W. G. Coulton was void or voidable in so far as it related to the assignment of or charge upon the aforesaid stipend?

Secondly. Whether the stipend vested in the trustee as and when received by the bankrupt?

Muir Mackenzie, for the trustee. The appointment held by the bankrupt is a public office. His salary is awarded him by the guardians, and is paid out of the rate. Such an appointment is

in fact a public office, and any assignment of it is contrary to public policy and void: *Palmer* v. *Bate* (1); *Cooper* v. *Reilly* (2); *Grenfell* v. *Dean and Canons of Windsor* (3); *Ex parte Huggins.* (4)

T. Willes Chitty, for the respondent, Coulton. Although the office held by the bankrupt may be of a quasi public character, it is not an office of state, to which alone the doctrine of public policy applies. In all the cases cited, the appointment has been from the state, and has been of a permanent nature. This appointment is held at the will of the guardians. It is not, therefore, a public office, and the salary is assignable at common law: *Feistel* v. *King's College, Cambridge* (5); *Metcalfe* v. *Archbishop of York.* (6) The alienation of a clerical stipend is only void or voidable under the statute of 13 Eliz. c. 20, which relates solely to charges by beneficed clergymen on their benefices. This chaplaincy is not a benefice. Again, if the assignment to Coulton is void on the ground of public policy, the stipend does not vest in the trustee.

Muir Mackenzie, in reply, referred to ss. 52 and 53 of the Bankruptcy Act, 1883.

Cur. adv. vult.

CAVE, J. The question in this case is whether a charge given by the bankrupt on his salary as chaplain of the Birmingham workhouse and workhouse infirmary, is void on the ground of public policy. As we all know, certain kinds of contracts have been held void at common law on this ground—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy. I have been referred to *Grenfell* v. *Dean and Canons of Windsor* (3) and *Ex parte Huggins* (4), as containing the clearest exposition of the law upon this subject. In the former case it was pointed out that, in order to avoid the assignment of the pay or salary of an officer on this ground, the office must be a public one, or in some way connected with the public service; and the public must be interested, not

(1) 2 B. & B. 673.
(2) 2 Sim. 560.
(3) 2 Beav. 544.
(4) 21 Ch. D. 85.
(5) 10 Beav. 491.
(6) 1 My. & Cr. 547.

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only in the performance from time to time of the duties of the office, but also in the fit state of preparation of the party having to perform them. On the former ground, the pay or salary of persons in the service of the Crown; and, on the latter ground, the half-pay of officers in the military or naval service, cannot be assigned. Similarly, in *Ex parte Huggins* (1), it was laid down that pay given to induce persons to keep themselves ready for the service of the Crown, and pay for actual services rendered to the Crown, cannot be assigned. On these grounds it has been held that the salary of a clerk of the peace—a freehold office connected with the administration of justice—cannot be assigned: *Palmer* v. *Bate* (2); nor can the salary of an assistant parliamentary counsel to the Treasury: *Cooper* v. *Reilly*. (3) It was in consequence of some of the expressions made use of by the Master of the Rolls in *Grenfell* v. *Dean and Canons of Windsor* (4) that this case was stated for my opinion, the learned judge of the county court entertaining some doubt whether a clergyman having the cure of souls was not a public officer within the meaning of the principle in question. Upon consideration I think that these doubts, although natural, are not warranted by any decided case. It has never been held that a clergyman having the cure of souls is a public officer; and, as I have said before, the doctrine in question ought not to be extended. At common law a beneficed clergyman can charge his benefice; and, although this was made unlawful by 13 Eliz. c. 20, yet when that Act was repealed in 1803 by the 43 Geo. 3, c. 84, a charge given between 1803 and 1817—when the 43 Geo. 3, c. 84, was repealed, and the 13 Eliz. c. 20, was revived by the 57 Geo. 3, c. 99—was held valid: *Metcalfe* v. *Archbishop of York*. (5) In this case it is true that the salary is paid out of a poor-rate, and that the chaplain, although appointed by the guardians, can only be dismissed by the Local Government Board; but I am of opinion that this is no solid ground of distinction. To make the office a public office, the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term. It is not enough that the

(1) 21 Ch. D. 85.
(2) 2 B. & B. 673.
(3) 2 Sim. 560.
(4) 2 Beav. 544.
(5) 1 My. & Cr. 547.

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due discharge of the duties of the office should be for the public benefit in a secondary and remote sense. I must, therefore, answer the questions put to me by saying that, in my judgment, the charge is not invalid on the ground suggested. With regard to the second point, there is, I think, no question that during the continuance of the bankruptcy and of the office, the salary subject to the charge vests in the trustee as property of the bankrupt within s. 44, subject to the power of the Court to make an order under s. 53, sub-s. 2, appropriating the salary in the manner therein pointed out.

Solicitor for trustee: *W. Murton.*
Solicitors for respondent: *Hulbert & Crowe.*

H. L. F.

C. A.
March 4.

[IN THE COURT OF APPEAL.]

SHEPHERD *v.* BERGER.

Landlord and Tenant—Lease—Breach of Covenant for Payment of Rent—Proviso for Re-entry—Construction.

A lease of a house contained a covenant by the lessee to pay rent on the usual quarter days, and a proviso for re-entry "if and whenever" any one quarter's rent should be in arrear for twenty-one days and no sufficient distress could be levied. There being three quarters' rent in arrear at Lady Day, 1890, the lessor, on April 25, 1890, distrained, and after sale of the distress there remained due more than a quarter's rent. The lessor on May 25 issued a writ for recovery of possession of the premises:—

Held, that the effect of the words "if and whenever" in the proviso was to give the lessor a right of re-entry as often as at any moment of time the two conditions named in the proviso existed, and that as these conditions existed when the writ was issued the action was maintainable, and the plaintiff was entitled to recover possession of the demised premises.

APPEAL from the decision of a Divisional Court (Day and Lawrance, JJ.), setting aside a verdict and judgment for the plaintiff in the Mayor's Court, and entering judgment for the defendant.

The action was brought to recover possession of a leasehold house of which the defendant was tenant to the plaintiff upon a breach of the covenant for payment of rent. The lease, which was for twenty-one years from Lady Day, 1889, contained the ordinary covenant for payment of rent on the usual quarter

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days, and a proviso for re-entry in the following form: "Provided that these presents are on this express condition, that if and whenever any one quarter's rent hereby reserved, or any part thereof respectively, shall be in arrear for twenty-one days and no sufficient distress can be had or levied for the same whether the same shall have been legally demanded or not, &c."

The first quarter's rent, due at Midsummer, 1889, was paid, but the following three quarters were not paid, and were in arrear for upwards of twenty-one days after March 25, 1890. On April 25, the plaintiff distrained for the three quarters rent, and the distress realized after payment of expenses rather less than the amount of two quarters' rent, leaving upwards of one quarter still in arrear. On May 25, the plaintiff issued a writ for recovery of possession of the premises, alleging that there was a quarter's rent in arrear and no sufficient distress on the premises. At the trial in the Mayor's Court, there was a verdict and judgment for the plaintiff; but the Divisional Court being of opinion, upon the authority of *Cotesworth* v. *Spokes* (1), that the distress amounted to a waiver of the forfeiture, entered judgment for the defendant.

The plaintiff appealed.

Henn Collins, Q.C., and *W. H. Griffith*, (*Morton Smith*, with them), for the plaintiff.

Henry Kisch, for the defendant.

[The arguments turned chiefly upon the question of waiver of the forfeiture; but as the judgments proceeded wholly upon the construction of the proviso for re-entry in the lease, it is unnecessary for the purposes of this report to state in detail the arguments of counsel or the cases cited in support of them.]

LORD ESHER, M.R. It is not necessary in this case to discuss the decided cases, for our decision depends entirely upon what is the true construction of the proviso for re-entry in this lease. By the lease rent is reserved quarterly in the usual way, and there is the ordinary covenant for payment of rent. If there were nothing else in the lease, and the rent fell in arrear, the

(1) 10 C. B. (N.S.) 103; 30 L. J. (C. P.) 220.

landlord would at that moment have the right to distrain, and if there were two or three quarters in arrear he could distrain for the whole; the right to put in the distress would arise on the covenant for the payment of rent wholly independent of this proviso which we have to construe. Now, there being three quarters' rent in arrear, the plaintiff distrained, as he had a perfect right to do, for the whole amount; the goods found on the premises were sufficient to satisfy any one quarter's rent, but not all the three quarters—in fact, not quite two. Having distrained, the plaintiff sold the goods, and his subsequent act, by claiming to exercise his right of re-entry in respect of the last quarter, shewed that he had appropriated the proceeds of the distress to the first two quarters' arrears. He had a right so to appropriate the proceeds, and would naturally so appropriate them; and his bringing the action of ejectment was conclusive evidence of his having done so.

Now, if the proviso for re-entry, which is entirely distinct from the covenant under which arises the right to distrain, had not contained the words "and whenever" a different consideration might have arisen, and it might well have been said that the word "if" referred only to the time when the distress was put in, and that although three quarters were actually due the landlord might and ought to distrain in respect of any one of them as and when it became due, and had therefore not brought himself within the meaning of the proviso. But the language of the proviso is "if and whenever"; that is to say, if at any moment there are arrears of rent which have been owing for twenty-one days, and there is no sufficient distress in the premises, the landlord's right to re-enter arises; the word "whenever" carries the right to re-enter from the time of the distress to any time afterwards. Now, the plaintiff having applied the proceeds of this distress to the first two quarters' arrears, there remained upwards of one quarter's rent due and in arrear, and it is obvious that in the present case there were no other goods which could be put on the premises to satisfy the last quarter's arrears. This state of affairs, and the rights arising thereon, continued till the moment before the writ in ejectment was served, at which moment it was perfectly true to say that

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there was a quarter's rent in arrear, that it had been in arrear for twenty-one days, and that there was no sufficient distress on the premises; and that being so, the plaintiff's right of re-entry was perfect, and he was entitled to succeed in his action. The judgment of the Divisional Court must therefore be reversed, and this appeal allowed.

BOWEN, L.J. I am of the same opinion, and will only add a few words out of respect to the judges in the Divisional Court, who came to a different conclusion. The question we have to determine is entirely one of the construction of this proviso for re-entry, and the fate of this appeal must be determined by the construction we place upon the words "and whenever." Let us suppose, first of all, that those words were not present in the proviso, and that its language ran, "if any one quarter's rent shall be in arrear"; in that case it might be contended that, assuming rent to be in arrear for twenty-one days and that there was no sufficient distress, the cause of forfeiture accrued immediately, a single cause of forfeiture in respect of that particular quarter's arrears. If that be so, it would be necessary to shew when the distress was made, and that there was no sufficient distress on the premises to meet that quarter's arrears, and it might have been difficult from the facts of the present case to say that there was no sufficient distress to satisfy any particular quarter's arrears. But that difficulty does not here arise. The language of the proviso is "if and whenever," which I think means that "if and as often as" a quarter's rent is in arrear, and the time arises at which the two conditions co-exist, then, however many causes of forfeiture there may have been before, there is still one existing cause of which the landlord may avail himself. Now, this was the condition of affairs at the time of the issue of the writ in ejectment; at that moment there was a quarter's rent more than twenty-one days in arrear, and there was no sufficient distress upon the premises; and it is of no avail to the defendant to say that there had been a distress, the proceeds of which, if appropriated to the quarter's arrears in respect of which the ejectment was brought, would satisfy them; for the landlord had the right if he chose to appropriate the

money to the first two quarter's arrears and not to the last, and we must assume that he did so. At this moment, therefore, there was a quarter's rent in arrear and no sufficient distress to satisfy it; the conditions of the proviso for re-entry were satisfied, and there is no answer to the plaintiff's claim for possession.

FRY, L.J. I am entirely of the same opinion, and have nothing to add.

Appeal allowed.

Solicitors for plaintiff: *Moon & Gilkes.*
Solicitor for defendant: *Joseph Davies.*

W. J. B.

HUNT *v.* GREAT NORTHERN RAILWAY COMPANY.

Jan. 26, 28.

Master and Servant—Truck Amendment Act, 1887 (50 & 51 *Vict. c.* 46)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Otherwise engaged in manual labour*"—*Guard of a Goods Train.*

The plaintiff was in the employment of a railway company as guard of a goods train. His main duty was to guard and conduct the train and to marshal the trucks; but it was also part of his duty at times to assist in coupling and uncoupling the trucks and in unloading them:—

Held, that he was not a "workman" as defined by s. 10 of the Employers and Workmen Act, 1875, and was not therefore a person to whom the provisions of the Truck Acts (1 & 2 Wm. 4, c. 37, and 50 & 51 Vict. c. 46) applied.

APPEAL from county court.

The plaintiff was a goods guard in the employment of the defendant company. His main duty as such was to marshal the trucks and to guard and conduct the train; but it was also part of his duty, whenever occasion required, to assist the porters in coupling and uncoupling the trucks and in transhipping goods from them. By the terms of his employment he was, in common with other servants of the company, required to contribute to a sick and funeral allowance fund established by the company for the benefit of their servants; his contributions were deducted from his wages, and such deductions were not returnable to him in the event of his leaving his employment. Having left the company's service, after being in it for some years, he brought an action in the county court to recover the amount of the deductions that had been made from his wages in respect of his

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contributions to the said fund, alleging that such deductions were illegal, as being in contravention of the provisions of the Truck Acts, 1 & 2 Wm. 4, c. 37, and 50 & 51 Vict. c. 46. It was contended on behalf of the company that the plaintiff, being employed as a goods guard, was not a person to whom the Truck Acts applied, not being engaged in manual labour. With that contention the county court judge agreed, and gave judgment for the defendants. The plaintiff appealed.

Lumley Smith, Q.C. (*Carrington*, with him), for the plaintiff. It is admitted that the plaintiff does not come within the Truck Act of 1831 (1 & 2 Wm. 4, c. 37), as it originally stood, not being a member of any of the special classes of labourers mentioned in s. 19 of that Act. But by the Truck Amendment Act of 1887 (50 & 51 Vict. c. 46, s. 2), the provisions of the principal Act are to apply to any "workman as defined in the Employers and Workmen Act, 1875, s. 10," by which latter section "the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, . . . has entered into or works under a contract with an employer." The plaintiff was such a person. It was part of his duty to do porter's work. In *Yarmouth* v. *France* (1) the driver of a trolly, whose duty it was also to unload the trolly, was held to be engaged in manual labour. So, too, in *Leech* v. *Gartside* (2), an overlooker of looms, whose duty it was to see that the looms were in working order and to execute repairs where necessary, was equally held to be within the Act.

Dodd, Q.C. (*Probyn*, with him), for the defendants. The question whether the plaintiff was engaged in manual labour is a question of fact. And the Court will not review the decision of the county court judge on a matter of fact. The case is more like those of *Moryan* v. *London General Omnibus Co.* (3) and *Cook* v. *North Metropolitan Tramways Co.* (4), where it was held in the one case that an omnibus conductor and in the other that a

(1) 19 Q. B. D. 647.
(2) 1 Times L. R. 391.
(3) 13 Q. B. D. 832.
(4) 18 Q. B. D. 683.

driver of a tramcar were not persons engaged in manual labour. In *Yarmouth* v. *France* (1), the county court judge had found that the man was engaged in manual labour, and the decision of the Lords Justices amounted to no more than this, that there was evidence on which he could so find.

Secondly, assuming that the plaintiff was a workman, the deductions on account of his contributions to the sick fund were legitimate, and not in the nature of truck: *Cutts* v. *Ward*. (2)

[On this point he was stopped.]

Lumley Smith, Q.C., in reply.

POLLOCK, B. This was an action by a goods guard of a railway company to recover arrears of wages. The defence was that the alleged arrears represented certain deductions from the plaintiff's wages, which by the terms of his employment the company were entitled to make by way of contribution towards a sick fund established for the benefit of the company's servants. To that the plaintiff replied that the deductions were illegal as being contrary to the provisions of the Truck Acts. Whether he was right in that contention depends upon the question whether he was a workman as defined in the Employers and Workmen Act, 1875—whether, that is to say, he was a person who was "engaged in manual labour," within the meaning of s. 10 of that Act. Now, the duty of a goods guard is much the same as that of a passenger guard, namely, to see that the train is properly put together, and to carefully conduct it. It is a duty requiring care, skill, and experience, and the labour which it involves is mental rather than physical. No doubt it would occasionally be his duty, where necessary, to assist the porters in the transhipment of goods to or from his train; but that is not enough to make him a person engaged in manual labour. His primary duty was to use his intelligence, not his hands. Neither in *Morgan* v. *London General Omnibus Co.* (3), where it was held that an omnibus conductor was not within the section, nor in *Cook* v. *North Metropolitan Tramways Co.* (4), where a similar decision was come to with regard to the driver of a tramcar, did the Court

(1) 19 Q. B. D. 647.
(2) Law Rep. 2 Q. B. 357.
(3) 12 Q. B. D. 201.
(4) 18 Q. B. D. 683.

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Pollock, B.

lose sight of the fact that the nature of the plaintiff's employment might involve to some extent the doing of manual work; but they were of opinion that, having regard to the nature of his primary duty, he was not a person engaged in manual labour. In the case of *Yarmouth* v. *France* (1) the ground of the decision was that it was the duty of the plaintiff not only to drive the trolly, but also to load and unload the goods that had to be transported on it, and that it was impossible to say that the former part of his duty was of more importance than the latter. I think that the county court judge was right in holding that the plaintiff in the present case was not a workman within the meaning of the Act. Moreover, the question seems to be mainly one of fact, and I do not see how we can be called upon to reverse his decision upon such a question.

CHARLES, J. The question is, What was the nature of the work in which the plaintiff was engaged? His main duty was to conduct, guard, and take care of the train, and, before commencing the conduct of the train, to marshal the trucks. It was also a part, though a very subordinate part, of his duty to assist, if occasion required, in coupling and uncoupling the trucks, and also in removing the goods. But the mere doing of those things cannot affect the general nature of his employment, which, in my judgment, was not one of manual labour.

Appeal dismissed.

Solicitors for plaintiff: *Ellgood & Ellgood.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

(1) 19 Q. B. D. 647.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1891
Jan. 22, 23;
Feb. 28.

PHELPS, JAMES & CO. *v.* HILL.

Ship—Bill of Lading—Shipowner's Liability—Deviation—"Necessity."

The "necessity" which will justify a ship in deviating from the proper course of her voyage exists where the deviation is reasonably necessary, and in considering whether it is so, danger, distance, accommodation, expense, and every other material circumstance must be taken into account; and if a competent master who is obliged to put back for repairs chooses one port in preference to a nearer one in the bonâ fide exercise of his judgment for the benefit of both the shipowner and the owner of the cargo, the Court or a jury ought not on light grounds to come to the conclusion that the deviation was unauthorized.

Goods were shipped by the plaintiffs at Swansea in the defendants' vessel for delivery at New York under a bill of lading which contained the usual exception from liability for collision. The vessel after leaving Swansea encountered bad weather, was injured, and the goods damaged by water, and it became necessary to put back to a port of refuge. The master cast anchor at Queenstown and telegraphed for directions to the defendants, who were shipbuilders at Bristol, but did not communicate with the plaintiffs. The defendants directed him to bring the ship back to Bristol. On her way to Bristol she was run into in the Avon by another vessel and sunk. At the trial of an action for the non-delivery of the goods on the ground that the vessel deviated from her course by proceeding to Bristol, and that the loss occurred after such deviation, it appeared that the ship was a general ship, and that there were other shippers of goods besides the plaintiffs, that although Bristol was sixty miles further than Swansea from Queenstown the vessel could have been repaired at less expense and with more despatch at the defendants' shipyards there than at Swansea, and that the defendants had other vessels into which they could have transhipped the goods. It did not however appear that Bristol was a more convenient place than Swansea for improving the condition of the damaged cargo. The judge left to the jury the question whether the master exercised the discretion of a reasonable man in the interests of the ship and cargo in going to Bristol instead of remaining at Queenstown, or going to Swansea. The jury found that there was no deviation:—

Held, first, that there was no misdirection by the judge in not telling the jury that the plaintiffs as owners of the cargo ought to have been communicated with at Queenstown, and consulted as to what ought to be done. Secondly, that the judge was not bound to have directed the jury that upon the facts as proved there was no evidence of necessity for the ship to return to Bristol. Thirdly, that the evidence was sufficient to support the verdict on the ground that the master had acted for the best, having regard to the interests of the owners of the goods as well as of the shipowners.

ACTION for the non-delivery at New York according to the bill of lading of goods shipped by the plaintiffs in the defendants' vessel.

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At the trial before Mathew, J. and a special jury, it appeared that the defendants, who were shipbuilders and shipowners at Bristol, were the owners of the steamship *Llanduff City*, which on December 27, 1889, left Bristol viâ Swansea for New York with a small part of her cargo on board, and on the same day reached Swansea. She there discharged some Swansea cargo, and took on board the cargo to which this action related, viz. 9925 boxes of tin plates and 150 boxes of thin iron plates not tinned. These formed the greater part of her cargo; but there were other owners of cargo about twenty in number.

By the bill of lading (which was on a printed form) the cargo was to be delivered in good order and condition at the port of New York, "the act of God; . . . . leakage; breakage; . . . . rust; frost; decay; contact with, or smell or evaporation from, any other goods; collision; stranding; straining; or other perils of the sea, rivers, navigation, or land transit of whatsoever nature or kind, and all damage, loss, or injury arising from the perils of things above mentioned, &c., always excepted. . . . . With liberty in the event of the steamer putting back into Bristol, or into any port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail or in tow of any other vessel, or in any other manner which the shipowner shall think fit, and to ship or tranship the goods by any other vessel." It was also provided that, "the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance."

On January 1, 1890, the *Llanduff City* left Swansea for New York. On the 4th the weather became very bad and the ship received such damage that on the 5th it became necessary to put back for repairs, and the master determined to put back to Bristol. The ship was at that time considerably to the west of Ireland, and the cargo was to some extent damaged. She put back to Queenstown, where she arrived on the 7th. The master telegraphed to the owners asking whether he should proceed to Kings Road, an anchorage off the Avon. The owners communicated with their underwriters, and telegraphed back that he should proceed to Bristol. Neither the master nor the owners communicated with any of the owners of the cargo. After a

stay of between four or five hours at Queenstown, during which the ship was refitted so far that she could proceed, she started for Bristol; but shortly after entering the Avon she was run into by a steamer which sunk her. The plates were ultimately raised and were sold at Bristol by auction, being materially damaged by the sea-water. The underwriters of the goods paid the loss on the understanding that they were to have all the rights of the owners of the goods, and this action was brought substantially on behalf of the underwriters.

Evidence was given to shew that the nearest port into which the vessel could have put when she turned back was Crookhaven; but it was admitted that it was better to put back to Queenstown. It was proved that the repairs to the vessel could have been perfectly well done at Queenstown; but it did not appear that there were facilities there for reconditioning the plates which formed the cargo, nor that it was a good place for selling them. Swansea, which the vessel had to pass on her way to Bristol and which was about sixty miles nearer than Bristol, was unexceptionable as to repairing the vessel and reconditioning the cargo; whether it was a good place for selling it was not clear. The advantage of going to Bristol was that the owners could repair the vessel in their own yard, which of course would be a great saving to them, and that they could do the repairs more expeditiously than anybody else, as they had duplicates of all the machinery of the steamer. Bristol, moreover, was a good place for disposing of tin plates, though it was not affirmatively shewn that it would be a good one for reconditioning them. The owners ran a line of vessels to New York, and if it had been determined to tranship the cargo there would consequently have been great facilities for doing so at Bristol.

The learned judge left to the jury the question whether the master exercised the discretion of a reasonable man in the interest of the ship and cargo in going to Bristol instead of remaining at Queenstown or going to Swansea. The jury found that there was no deviation, and judgment was entered for the defendants.

The plaintiffs moved that the verdict and judgment might be set aside and judgment entered for the plaintiffs, on the grounds,

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first, that the verdict was against the weight of evidence; secondly, that there was no evidence to shew that it was necessary for the ship, having got to Queenstown, a safe port, to leave it, or after leaving it to proceed to Bristol; thirdly, that the judge ought to have directed the jury that, the ship having arrived at a safe port, the master was bound to communicate with the owners of the cargo before leaving Queenstown; fourthly, that the judge ought to have directed the jury that if it was necessary to leave Queenstown the master was bound to proceed to the nearest safe port where the ship and cargo could be dealt with; fifthly, that the judge should have directed the jury that there was no evidence that it was necessary for the ship and cargo to be taken to Bristol.

1891. Jan. 22, 23. *Barnes, Q.C.*, and *Aspinall*, for the plaintiffs. First, the verdict was against the weight of evidence; and secondly, the judge misdirected the jury. The evidence shews that the master of the ship deviated from his course without necessity; and that he sacrificed the interests of the owners of the cargo to those of the owners of the ship. The law is clearly established that a deviation cannot be justified without necessity: *Lavabre* v. *Wilson* (1); and no necessity has been shewn in this case. If the ship could not be repaired at Queenstown she ought to have been taken to Swansea. There was no necessity to take her on to Bristol. It is contended that Bristol was more convenient for the shipowners, and that the repairs could be completed there at less expense; but it is not a question of convenience or expense, but of necessity. The master paid no regard to the interests of the cargo-owners. He telegraphed to the shipowners for instructions, but did not communicate with the cargo-owners, as he ought to have done. The cargo might have been sold or reshipped at Swansea quite as well, if not better, than at Bristol. Again, there were misdirections—first, the judge ought to have told the jury that no deviation could be justified unless it was shewn to be necessary; and secondly, he ought to have told them that it was the master's duty to communicate with the owners of the cargo and to ascertain their wishes.

(1) 1 Dougl. 284.

The master cannot lawfully deviate to a port more distant than the nearest port where the ship and cargo can be reasonably and properly dealt with. Suppose a ship damaged without any injury to the cargo, and a port at hand where the ship could be properly repaired, the master would not be justified in going on to a more distant port that the shipowner might do the repairs himself, for it would be exposing the cargo to extraordinary risk for the benefit of the shipowner. Deviation is only allowed in case of necessity: Arnould on Insurance, 5th ed. p. 495; 6th ed. p. 500. In *Lavabre* v. *Wilson* (1), Lord Mansfield says: "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires." Abbott on Shipping, 12th ed. p. 306; Parsons on Marine Insurance, II. p. 2; *Turner* v. *Protection Insurance Co.* (2); and *Ewbank* v. *Nutting* (3), proceed on this rule.

Bigham, Q.C., Sir Walter Phillimore, and *Pyke,* for the defendants. "Necessity" is to be taken in a qualified sense: it does not mean absolute necessity so as to leave no room for discretion, and if the master exercises a bonâ fide reasonable discretion as to the port into which he will put for repairs, his decision will be upheld though he has made a mistake: Phillips on Insurance, ss. 1018–1022; *Turner* v. *Protection Insurance Co.* (2) There is evidence that the cargo was considerably damaged, and it would not have been right to stop for repairs at Queenstown, where it could neither have been reconditioned nor sold to advantage.

[LINDLEY, L.J. You need not trouble yourselves about Queenstown; your difficulty is Swansea.]

It was purely a question of fact for the jury whether the master did not act in good faith for the benefit of all parties in going to Bristol rather than Swansea. In estimating what is reasonable necessity, a jury may well adopt the conclusion of an intelligent master to which he has honestly come under circumstances which he knows much better than they possibly can. Again, by the terms of the bill of lading, any damage which the cargo-owners can cover by insurance does not affect

(1) 1 Dougl. 284, 290.

(2) 25 Maine, 515.

(3) 7 C. B. 797.

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the shipowners. This risk from deviation is a risk which is commonly insured against.

Barnes, Q.C., in reply. The clause in the bill of lading as to insurance was never meant to cover breaches of contract; such exceptions are to be construed very strictly: *Taylor* v. *Liverpool and Great Western Steam Co.* (1); *Crewe, Widgery & Co.* v. *Great Western Steam Ship Co.* (2) As to whether the deviation was an allowable one, no question arose in *Turner* v. *Protection Insurance Company* (3) as to the particular port to be gone to, so the case is not in point. Necessity, and not bona fides is the test: *Australian Steam Navigation Co.* v. *Morse* (4), where it was held that "necessary" was equivalent to "clearly highly expedient," and that there was not a "necessity" for adopting a particular course if a better course could be found.

1891. Feb. 28. LINDLEY, L.J., after stating the facts, proceeded as follows:—The voyage being fixed by the contract of affreightment, it is the duty of the master to proceed to the port of delivery without delay, and without any unnecessary departure from the direct and usual course. But circumstances may arise which render it necessary to depart from this usual course, and tempestuous weather injuring the ship and rendering it necessary to put into some port of repair is one of those circumstances. When a ship is thus injured it is the duty of the master to do the best he can for all concerned; but his primary duty being to complete the voyage with as little delay as possible, it follows that his first care ought to be to get his ship repaired as soon as possible, and to resume his voyage as quickly as he can. The same principle may be expressed in other words, e.g., by saying that he ought to go to the nearest port where the necessary repairs can be most quickly done, or by saying that there ought to be no unnecessary departure from the proper course of the voyage and no unnecessary delay in prosecuting it. But in whatever language the rule is expressed, it must not be so worded as to exclude the element of reasonableness. By "possible" and "necessary" is meant reasonably possible and reasonably neces-

(1) Law Rep. 9 Q. B. 546.
(2) W. N. (1887) 161.
(3) 25 Maine, 515.
(4) Law Rep. 4 P. C. C. 222.

sary, and in considering what is reasonably possible or reasonably necessary every material circumstance must be taken into account—e.g., danger, distance, accommodation, expense, time, and so forth. No one of these can be excluded. Mr. Barnes invited us to exclude the element of expense; but to say that, as a matter of law, expense is to be disregarded, would be to make the rule far too rigid. Suppose there are two ports, both equally safe and accessible, and in all respects proper for repairing the ship; but suppose one is a dear port compared with the other, a reasonable man would naturally and properly choose the cheaper. Suppose the cheaper port to be a little more out of the way than the other, is it reasonable to say that the master *must* go to the other? I can find no authority for so rigid a rule. All the decisions on the subject of deviation shew that what is reasonably necessary is permissible in these cases: see 1 Arn. Ins., p. 454, ed. 2; p. 502, ed. 6; 1 Phillips' Ins., ss. 1018–1022. Lord Mansfield said, in *Lavabre* v. *Wilson* (1): "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires." But this passage, though often referred to, has never been understood as excluding the element of reasonableness. Moreover, if a master of competent skill and knowledge, and acting bonâ fide in the interest of all concerned, has chosen one port in preference to another, then although the Court or a jury may and ought to take a different view if they come to the conclusion that he ought to have acted differently, they ought not to come to such a conclusion on light grounds. In a nicely balanced case they are fully justified in attaching considerable weight to the master's judgment and in allowing that to turn the scale in their own minds. This is what I understand Mr. Phillips to mean in s. 1022 of his well-known book, and what the Court laid down in the American case of *Turner* v. *Protection Insurance Co.* (2) In that case the Court said: "The master in most cases must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed with safety to a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision

(1) 1 Dougl. 291. (2) 25 Maine, 515.

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respecting these matters, made in good faith, should be satisfactory to all interested, although he may err in judgment." That was an action on a policy in which deviation was relied on as a defence. There was no conflict between the cargo-owner and the shipowner, as in the case before us. But the same principle is applicable to both classes of cases. Applying this principle to the present case, can we set the verdict of the jury aside? I think not.

Mr. Barnes complained of misdirection on the ground that the learned judge ought to have told the jury that the cargo-owners ought to have been communicated with at Queenstown and have been consulted as to what ought to be done. No authority was cited in support of this proposition, and principle and considerations of expediency are against it. Are the cargo-owners to be consulted about repairing the ship? That is nothing to them, provided the voyage is duly completed. Are they to be consulted as to what is to be done with the cargo? How is this possible if the ship is a general ship? How is the master to know who the owners of the cargo are? What is he to do if they differ in opinion? To hold that they ought to be consulted would be to impose a new and intolerable burden on the master.

It was also contended that there was misdirection in omitting to tell the jury that no deviation could be justified that was not necessary, and that the judge did not sufficiently explain the importance of this to the jury. But this contention is based on the assumption that what is meant by "necessary" is something much more rigid than what is reasonably necessary in a nautical and commercial sense.

Then it was said that the verdict was against the weight of the evidence; that the evidence shewed that the master sacrificed the interests of the cargo-owners to the interests of the shipowners; that he acted on their orders and not on his own judgment; that even if he was justified in leaving Queenstown he ought to have put into Swansea, and not Bristol. Having studied the evidence with care, I cannot disagree with the jury. I find it quite impossible to say that twelve men could not have found a verdict for the defendants if they had really understood the evidence. I am satisfied that the master did consider the

interests of the cargo-owners as well as those of his immediate employers, and that he did bonâ fide act to the best of his judgment in the matter. It may be that Swansea would have been as good and in some respects a better port to put into than Bristol; but, on the other hand, there was less risk of delay in Bristol, and there were advantages to the shipowners which there was no real reason for sacrificing. These were all matters fairly before the jury, and for them to consider and determine. In my opinion, it would be wrong to disturb the verdict. It is not necessary to determine the point raised by the defendants on the clause as to insurance, but I am inclined to think that it has reference to the voyage contracted for, and not to unjustifiable departures from it. The motion is refused with costs.

LOPES, L.J. The question in this case is whether there was a deviation. If there was a deviation, or, in other words, if the deviation was not justified, the shipowner is liable for a loss by the perils of the sea, and is not protected by the exception of perils in the contract. The voyage must be prosecuted without unnecessary delay or deviation. The shipowner's contract is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly without any unnecessary deviation. But this undertaking is to be understood with reference to the circumstances that arise during the performance of the contract. He is not answerable for delays or deviations which are occasioned or become necessary without default on his part. Where the safety of the adventure under the master's control necessitates that he should go out of his course, he is not only justified in doing so, but it is his duty in the right performance of his contract with the owners of the cargo. The shipowner through his master is bound to act with prudence and skill and care in avoiding dangers and in mitigating the consequences of any disaster which may have happened. The master is bound to take into account the interests of the cargo-owners as well as those of the shipowner. He must act prudently for all concerned. So strict is the rule with regard to deviation that, while the master may deviate to save life, he may not deviate to save property. Going

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into a port out of the usual course for necessary repairs, and staying till they are completed, is no deviation, provided it plainly appears that such repairs, under the circumstances and at such port, were reasonably necessary, and the delay not greater than necessary for the completion of such repairs, so as to enable the vessel to proceed on her voyage. The deviation must not be greater than a reasonable necessity demands, having regard to the respective interests of shipowner and cargo-owner. A reasonable necessity implies the existence of such a state of things as, having regard to the interests of all concerned, would properly influence the decision of a reasonably competent and skilful master.

I now proceed to apply the law as I have stated it to the present case. That the master was justified in the circumstances in seeking a port of refuge is not denied. The port first touched was Queenstown. Nor is it seriously contended that he was not justified in leaving Queenstown, where the cargo could not be reconditioned, and proceeding to a more suitable port. The question is whether, in the circumstances, he was justified in proceeding to a more distant port, viz., Bristol, rather than to a nearer port, viz., Swansea. Bristol was sixty miles farther than Swansea from Queenstown. The vessel was lost by a collision in the river Avon when making her way to Bristol. The shipowners were shipbuilders at Bristol, where they had large repairing and building yards. It was said they had there machinery of a similar kind to that on board the vessel in question which could easily be fitted into the vessel, and which would take the place of that which had been damaged. They had also steamers on the same line as the vessel in question, into which, it was said, the cargo could be transhipped. The master, when at Queenstown, telegraphed to his owners at Bristol, who telegraphed to their underwriters, asking for directions. Upon receiving an answer from their underwriters the owners directed the master to bring the vessel to Bristol.

After hearing the evidence and a very careful summing up from the learned judge, the jury came to the conclusion that the master was justified in acting as he did, and that there was no deviation. It was said that the learned judge should have

directed the jury that there was no evidence upon which they could find that the master was justified in proceeding to Bristol. Such a contention is untenable. Beyond all doubt it was a question to be left to the jury. But then it is said that the verdict found by the jury was against the weight of the evidence, and one which twelve reasonable men, having regard to all the circumstances, could not reasonably find. I cannot adopt this view. I am of opinion there was ample evidence to support the conclusion at which the jury by their verdict arrived. The master was an intelligent, competent, and skilful master, and the measures taken by him were taken in good faith, and an honest exercise of discretion used within its proper limits. Can it be said that the jury were so wrong that their verdict ought to be set aside, if they thought such a state of things existed as, having regard to the interests of all concerned, might properly influence the decision of the master, and induce him to go to Bristol rather than Swansea? For the shipowner, Bristol was the more desirable port, nor was it unreasonable for the jury to think upon the evidence that Bristol was better for the cargo-owner, because there would be less delay in refitting and proceeding on the voyage. It is very difficult to say what the state of the cargo was, and how far it required to be reconditioned; but, assuming it required reconditioning, there is no evidence to shew that this could not be as well done and at as little expense at Bristol as at Swansea. I can discover no consideration of danger, distance, accommodation, expense, or time which made Swansea so preferable to Bristol as to justify the jury in saying the master was wrong in going to Bristol. In these circumstances, it is impossible to say the jury were wrong in the verdict they found; it was a question for them, and they had ample evidence to find as they did.

It was said the master, at Queenstown, before determining to proceed to Bristol ought to have communicated with the cargo-owners. There is no authority for this. Moreover, the ship was a general ship, and there were twenty cargo-owners. It might be that some of the bills of lading were indorsed, and to communicate with such cargo-owners would be impracticable. The motion must be refused.

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KAY, L.J. An extremely interesting and important question has been raised by this motion—viz., what amounts to such necessity as will justify a departure by the master of a ship from the strict course of the voyage, and, when there is a necessity for departure, how far such departure may go without amounting to what is called in law a "deviation."

The ship was a steamer. The voyage was from Bristol, touching at Swansea to complete cargo, and thence to New York. The cargo was chiefly tin plates. There were some chemicals. The ship was despatched by the owners, and there were about twenty shippers of cargo.

The ship completed her cargo and was on her way to New York when she encountered very heavy weather, during which the fore-hatch was carried away, the decks strained and injured, a considerable amount of water made its way from the deck into the hold, some damage was done to the tin plates, the donkey-engines were disabled, the pumps choked, the ship was in some danger, and both sides agree that it was necessary to put back to a port of refuge. The nearest was Crookhaven, but the most convenient was Queenstown. The ship made for Queenstown, where she put down a single anchor, as the captain says, because his intention was to return to Bristol to refit. The owners of the ship were themselves shipbuilders; their building yards were at Bristol; they had duplicates there of the different parts of the ship's machinery. Moreover, they had a line of similar steamers which departed on the same voyage periodically, and the captain suggests that it might be possible, if necessary, to tranship the cargo into another of those steamers which had shortly to start. Accordingly, he telegraphed to the owners, who, after communicating with their underwriters, directed him to bring the ship back to Bristol. On her way thither she was run into in the Avon by another steamer and sunk. This was a risk excepted by the terms of the bill of lading if it occurred during the proper voyage. The question is whether the captain was right in not having the ship repaired at Queenstown, and, if he was, whether he should not have proceeded to Swansea rather than Bristol, as it was some sixty or seventy miles nearer to Queenstown, and a better place, it is suggested, for selling the cargo

if it should have to be sold, and also for retinning any of the plates that might require to be so treated—an operation which could hardly be performed at Bristol.

The general law on the subject of deviation is not in controversy; it can hardly be better expressed than in the words of Lord Mansfield in *Lavabre* v. *Wilson.* (1)

"A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so it would only be necessary to give an additional premium. It is that the party contracting has voluntarily substituted another voyage for that which has been insured."

I cannot find that those words have ever been criticized. They are adopted in the latest editions of the text-books on the subject.

Another proposition, which seems equally well-established, is that where there is upon the evidence a question whether what the captain did was necessary under the circumstances, that question is proper to be determined by the jury: *Motteaux* v. *London Assurance Co.* (2); *O'Reilly* v. *Gonne.* (3)

Without attempting any exhaustive definition of what amounts to necessity in such cases, I think it may fairly be said necessity does not mean absolute physical necessity only, but a reasonable necessity having regard to the interest of the shipowners and also of the cargo-owners, and to all the other circumstances of the case.

It is suggested here that the learned judge should have directed the jury that the captain, before leaving Queenstown for Bristol, should have obtained permission not only from the shipowners, but also from the cargo-owners. No authority for this has been produced, and the practical impossibility of communicating with twenty different consignors, and the consideration that some of them might have indorsed their bills of lading and ceased to have any interest in the adventure, is a sufficient answer to this suggestion.

(1) 1 Dougl. 291. (2) 1 Atk. 547.

(3) 4 Camp. 249.

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A more serious question is whether the learned judge should have directed them that, upon the facts as proved, there was no evidence of necessity to return to Bristol, but that the utmost the captain should have done if he did not refit at Queenstown was to have gone to Swansea. But if upon the evidence there was any doubt as to this question, the case was clearly one to be decided by the jury. I cannot bring myself to the conclusion that there was no evidence to go to the jury which could raise such a doubt. But then, it is argued, even if there was some evidence, the verdict was so much against the weight of evidence that the Court should direct a new trial. No doubt it is important on this question to observe that the summing-up of the learned judge was rather against the verdict. I think the question is between Swansea and Bristol, a distance of, say, sixty miles—that is, three or four hours' steaming. Expedition in refitting the ship is a most important consideration for the cargo-owners as well as for the shipowners. It is reasonably argued that this would be more quickly done at the shipowners' yards than elsewhere, beside the saving of expense which would certainly be effected. The matter is really reduced to the question whether what was done was the best thing considering the interest of the cargo-owners as well as of the shipowners. Here the great difficulty is that we have very little evidence as to the actual state of the cargo and the amount of injury it had sustained. I am unable to satisfy myself that, upon consideration of all the circumstances, the verdict was such as reasonable men could not fairly have come to. There is so much doubt about what was the right course to take, that I think it may be said that if the jury had considered that the captain ought to have put into Swansea, or even ought to have stayed at Queenstown, although there were strong reasons against his doing that, it would be difficult for this Court to have interfered with their verdict.

Order for new trial refused.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Ingledew, Ince, & Colt.*

H. C. J.

[IN THE COURT OF APPEAL.]

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Jan. 22; *March* 21.

STEINMAN & CO. *v.* ANGIER LINE, LIMITED.

Ship—Bill of Lading—Exception of "Pirates, Robbers, or Thieves, of whatever kind, whether on Board or not, or by Land or Sea"—Theft by Persons in Service of Ship.

Goods were shipped on board the defendants' ship under a bill of lading containing an exception clause, by which the defendants were exempted from liability in respect of losses caused by (inter alia) "pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea." The goods were stolen after shipment by some or one of the stevedore's men employed in the service of the ship:—

Held, that the exception clause did not apply to thefts committed by persons in the service of the ship, and that the defendants were consequently responsible for non-delivery of the goods.

APPEAL from the judgment of A. L. Smith, J., at the trial without a jury.

The facts were as follows: The action was by the owners of goods shipped on board the defendants' ship for carriage from Liverpool to Buenos Ayres for non-delivery of the same. The bill of lading contained an exception clause by which the defendants were not to be liable for losses caused by (inter alia) "the act of God, the Queen's enemies, pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea, rain, spray, barratry of the master or mariners, adverse claims, restraint of princes, rulers, or people." The exception clause also exempted the defendants from liability for loss caused by certain other perils enumerated, "whether arising from the negligence, default, or error of judgment of the owners, master, mariners, engineers, or others of the crew, or otherwise howsoever," and it was likewise provided that the shipowners should not be liable for or in respect of any neglect or error in judgment on the part of the master, pilot, crew, or other persons whosoever in their service or employment, or of the shipowners' agents at the port of loading, or any person or persons employed by them, whether employed on the ship or otherwise. The learned judge found that the goods in question were stolen, after being shipped, by some or one of the stevedore's men employed to load the

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ship. The stevedore was by the terms of the charterparty appointed by the charterers, but was paid by and in the service of the ship. The learned judge was of opinion that a theft by persons in the service of the ship was not within the exception clause, and therefore gave judgment for the plaintiffs for the value of the goods.

Jan. 22. *Gorell Barnes, Q.C.*, and *Hurst*, for the defendants. The shipowners are not liable in respect of these goods. The exception in the bill of lading covers all thefts, whether by thieves external to the ship or by persons employed in the service of the ship. The words "of whatever kind, whether on board or not," are of the widest possible character, and were inserted no doubt to meet the decision in *Taylor* v. *Liverpool and Great Western Steam Co.* (1), where it was held that the word "thieves" only applied to thieves external to the ship.

[They also cited *Norman* v. *Binnington*. (2)]

Bigham, Q.C., and *Carver*, for the plaintiffs. The exception does not cover thefts by persons in the employ of the shipowner or doing his work. The defendants' contention must go the length of saying that, if the goods were stolen by the shipowner himself, the exception would apply. It will be seen that the words "whether on board or not" can be amply satisfied, without adopting the defendants' contention, when it is remembered that it is the practice for the mate to give a receipt for the goods, when they are on the quay side, before they are on board, and that the goods are then in the shipowners' custody. The words "of whatever kind" were probably inserted because of the observation of Archibald, J., in the case of *Taylor* v. *Liverpool and Great Western Steam Co.* (3), where he said that in policies of insurance the word "thieves" has been held to refer to theft with violence, to latrocinium as opposed to furtum. The rule of construction is that exceptions in a bill of lading are to be construed against the shipowner: *Phillips* v. *Clark*. (4)

[They also cited 2 Arnould, Marine Insurance, 6th ed. pp. 771, 774.]

(1) Law Rep. 9 Q. B. 546.
(2) 25 Q. B. D. 475.
(3) Law Rep. 9 Q. B. 546, at p. 551.
(4) 2 C. B. (N.S.) 156.

Hurst, in reply, cited *Hayn* v. *Culliford*. (1)

Cur. adv. vult.

March 21. The following judgments were delivered:—

BOWEN, L.J. This is an action brought by the owner of goods against the shipowner in respect of the loss of cargo, found by A. L. Smith, J., to have been stolen by the stevedore's men during stowage. The bill of lading includes among the exceptions "thieves of whatever kind, whether on board or not, or by land or sea." The stevedore under the charterparty was appointed by the charterer, but paid by the ship and in the service of the ship. Is the shipowner liable to make good the loss? This depends upon the true construction of the exception and its effect on the primâ facie liability of the shipowner, from which the exceptions are intended within defined limits to release him. The history of the introduction into English policies and English bills of lading of special provisions as to "thieves" requires to be borne in mind. The broad principle of commercial law always was and is that the ship, in the absence of express provision to the contrary, was liable to the cargo-owner for losses occasioned by theft committed on board. This idea was of cardinal moment both in the law of insurance and in the law of carriers. In the earliest forms of insurance, before the middle of the 17th century, there were no express words which covered losses by theft, and theft on board a vessel, since it presumably proceeded from negligent custody, and not from accident, was not a peril of the sea. Furtum non est casus fortuitus. "Insurers," says Emerigon, c. 12, s. 29, "are not responsible for simple theft committed on board the vessel, because it is presumed with reason, that the accident has happened through some default of the captain or crew." About the middle of the century in question the word "thieves" found its way into the list of the marine casualties against which insurances were effected, and from this time forth there has been a recurring discussion both in England and America as to the extent to which in policies of insurance effect ought to be given to this special stipulation. Robbery imports violence, but "theft," which, properly speaking,

(1) 3 C. P. D. 410; 4 C. P. D. 182.

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does not, may be of several kinds. There may be the assailing thief from outside, the thief who "breaks through and steals"; there may be a thief on board among those who are lawfully on board; there may, lastly, be a thief among the crew. The controversy has principally turned upon the question whether the term "thieves" ought not to be confined to the first of these categories, viz., the depredators outside the ship. That the expression was wide enough to cover, not merely thefts on board by passengers, but also thieves among the crew or servants of the shipowner, has scarcely been suggested, except in an American authority which will hereafter be mentioned. At the first it appears to have been uncertain to what extent the introduction into English policies of the word "thieves" really affected the insurer. In Malyne's Lex Mercatoria, c. 25, p. 109, the term is interpreted to mean "assailing thieves," "for otherwise," says Malyne, "if there be thieves on shipboard . . . the master of the ship is to answer for that and make it good, so that the assurers are not to be charged with any such loss," which, Malyne adds, "sometimes is not observed": see also Roccus de Navibus, c. 42 and c. 43; Beawes, 6th ed., pp. 190, 196; Weskett on Insurance, ed. of 1781, p. 543; 1 Marshall, Insurance, 187. The language of Malyne has not been, however, universally accepted as applicable to those policies where express mention is made of thieves: see Park, Insurance, ed. of 1809, p. 30. And in the case of the *Atlantic Insurance Co.* v. *Storrow* (1), Chancellor Walworth distinguishes the expressions used in Malyne, Weskett, Roccus, and Emerigon, on the ground that they are speaking only of the general contract against loss by sea risks and without reference to the express clause in modern policies against loss by thieves. The chancellor accordingly held the insurer liable for a loss occasioned by the act of thieves, who had no connection with the ship, although the master and ship might also be liable as carriers on their bills of lading. In *American Insurance Company of New York* v. *Bryan* (2), a similar question arose before the Supreme Court of New York in an action upon a policy which contained the word "thieves." The chief justice at the trial had directed the jury that a loss by theft, whether by assail-

(1) 5 Paige, Chancery (New York, 1835), 293. (2) 1 Hill, 25 (1841).

ing thieves or by embezzlement of the crew, or by whatever person, was within the policy, and this direction was upheld by the Court. No English case, however, has gone to this extent; and the law so laid down has been doubted by writers of authority: see 3 Kent's Comment. 11th ed. p. 397; 1 Phillips on Insurance, 2nd ed. p. 649. The introduction of the term "thieves" into the exceptions in English bills of lading is of a later date, in older bills of lading dangers of the sea being the only accidents excepted (Beawes, p. 196; Abbott, 5th ed. p. 214). For goods stolen or embezzled the master was liable, unless there was vis major (1 Molloy, p. 329). By degrees the list of exceptions was expanded, and the word "thieves" in a bill of lading has received a judicial interpretation in the case of *Taylor* v. *Liverpool and Great Western Steam Co.* (1) It was there held in effect that the term was only intended to deal with thefts by persons "not belonging" to the ship, an expression which, however, is ambiguous, but which in Taylor's case seems to be used as equivalent to persons outside the ship. The present form of bill of lading is subsequent in date to the decision in Taylor's case, and is designed apparently to widen still further the meaning there attributed to the word "thieves." But thieves may "belong" to a ship in two ways. They may be persons who, though they are lawfully on board, have nothing to do with the service of the ship; or they may be the master and crew or persons in the service of the ship. Is the language "thieves of whatever kind, whether on board or not, or by land or sea," intended in this bill of lading to add both of these classes of depredators, or only the former class, to the "outside thieves" who were previously covered by the word in ordinary bills of lading? This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land, viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his

(1) Law Rep. 9 Q. B. 547.

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servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly, in *Grill* v. *General Iron Screw Collier Co., Limited* (1), an exception in a bill of lading of "accidents of whatever nature or kind soever" was held not to cover a collision caused by the negligence of master and crew: see also *Phillips* v. *Clark* (2), *Czech* v. *General Steam Navigation Co.* (3) It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils: the exception, in other words, limits the liability, not the duty. Upon this ground, I am of opinion on this bill of lading that the mere introduction into the list of exceptions of the words "thieves of whatever kind," &c., does not relieve the shipowner from liability for the thefts committed by those in the service of the ship. A subsequent clause in the bill of lading exempts the shipowner from liability for neglect or error in judgment, but leaves wilful misconduct of those in the ship's service still untouched. If it was intended to relieve the shipowner from liability for thefts committed by persons in the ship's service, clear and explicit language to that effect should have been used. I agree accordingly with A. L. Smith, J., and think that this appeal must be dismissed with costs. The Master of the Rolls concurs in the result at which I have arrived.

FRY, L.J. I am of the same opinion. A long series of authorities has determined that the shipowner cannot relieve himself from the liability that would ordinarily attach to him except by express words; and the words of exception here are general, and not express, and stand in marked contrast to the subsequent words by which his liability is expressly excluded for mere negligence or error of judgment of the master or crew or others in the service of the ship.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson North & Johnson, Liverpool.*

Solicitors for defendants: *Downing, Holman & Co.*

(1) Law Rep. 1 C. P. 600; on appeal, Law Rep. 3 C. P. 476.

(2) 26 L. J. (N.S.) C. P. 168.

(3) Law Rep. 3 C. P. 14.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1891
March 3.

CLINK *v.* RADFORD & CO.

Ship—Charterparty—Cesser Clause—Charterer's Liability to cease on Cargo being loaded—Lien for Demurrage—Damages for Detention at Port of Loading.

By a charterparty the ship was to load a cargo in the usual and customary manner and proceed to the port of discharge, and there deliver the same "to be unloaded at the average rate of not less than 100 tons per working day . . . or charterers to pay demurrage at the rate of 4*d.* per ton register per diem . . . the charterers' liability under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage." In an action by the shipowner against the charterers to recover damages for detention at the port of loading:—

Held, that the word "demurrage" in the lien clause did not cover damages for undue detention at the port of loading, and that therefore the cesser clause did not exempt the charterers from liability for the delay.

Bannister v. *Breslauer* (Law Rep. 2 C. P. 497) discussed.

APPEAL from the judgment of Pollock, B., at the trial, with a jury, of an action by a shipowner against charterers to recover damages under a charterparty for detention at the port of loading.

By the charterparty the plaintiff's ship was chartered by the defendants for a voyage from Newcastle, New South Wales, where she was to load "in the usual and customary manner a full and complete cargo of coals," to San Francisco, and there to deliver the same, "the cargo to be unloaded at the average rate of not less than one hundred tons per working day . . . or charterers to pay demurrage at the rate of fourpence per ton register per diem, except in case of unavoidable accident . . . the charterers' liability under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage."

At the trial the jury found that the defendants detained the ship in loading sixteen days beyond what was usual and customary, and assessed damages for such detention. Upon the argument on further consideration the defendants contended that their liability for detention at the port of loading ceased under the charterparty upon the ship being loaded. The learned

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judge held that the cesser clause did not apply, and gave judgment for the plaintiff. The defendants appealed.

R. T. Reid, Q.C., and *Spokes*, for the defendants. The cesser clause applies to liability for detention at the port of loading. There is no rate of demurrage specified in the charterparty so far as regards the loading of the cargo. The result of the cases seems to be this: that the cesser clause takes effect where the shipowner is protected by the lien; that the cesser clause applies to past as well as future breaches; and that accordingly to protect the shipowner the Court construes the lien clause liberally by extending it beyond demurrage in its strict legal sense, and applying it to damages for undue detention at the port of loading. The case of *Lockhart* v. *Falk* (1) is not contrary to this view; but if it decided that where there was no clause in the charterparty allowing demurrage at the port of loading the cesser clause did not apply to liability for detention at the port of loading, that case is not consistent with the subsequent cases. In *French* v. *Gerber* (2), Brett, J., in delivering the judgment of the Court, seemed to think that the presumption is against the cesser of liability unless the clause plainly shews that the liability is to cease. In the same case in the Court of Appeal (3), Mellish, L.J., seemed to put the presumption the other way—that all liability is to cease unless there is something to shew the contrary. It is submitted that the latter is the true view. In *Francesco* v. *Massey* (4) and *Kish* v. *Cory* (5) the cesser clause was held to apply to liabilities for past breaches. In *Bannister* v. *Breslauer* (6) the cargo was to be loaded and discharged "with all dispatch," and there was no provision for demurrage in the charterparty. It was held that the cesser clause released the charterers from liability for undue detention at the port of loading, the lien for "demurrage" covering the breach. That case, no doubt, was questioned by some of the judges in *Gray* v. *Carr* (7); but it was treated as binding in *Francesco* v. *Massey* (4), and has never been overruled. That

(1) Law Rep. 10 Ex. 132.
(2) 1 C. P. D. 737.
(3) 2 C. P. D. 247.
(4) Law Rep. 8 Ex. 101.
(5) Law Rep. 10 Q. B. 553.
(6) Law Rep. 2 C. P. 497.
(7) Law Rep. 6 Q. B. 522.

case shews that the word "demurrage" may include damages for detention at the port of loading. The cesser clause is the governing clause, and if necessary the lien clause must be extended so as to be co-extensive with the cesser clause. If that cannot be done, still the cesser clause must have full meaning given to it, even though the shipowner is left without any remedy in respect of the particular breach complained of. There is no difficulty about a lien for unliquidated damages; the course to pursue is to pay the amount claimed to the dock company or into a bank, as was done in *Dahl* v. *Nelson* (1), and so obtain the release of the cargo. They also referred to *Sanguinetti* v. *Pacific Steam Navigation Co.* (2), *Harris* v. *Jacobs* (3), and *Restitution Steamship Co.* v. *Pirie.* (4)

J. G. Barnes, Q.C., and *Leck*, for the plaintiff, were not called upon, but they referred to *Gardiner* v. *Macfarlane.* (5)

LORD ESHER, M.R. It seems to me, without going through the cases that have been referred to, that certain rules have been laid down in them which will enable us to decide this particular case. In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charterparty, is that the Court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract. If that be true, then the question in this particular case, as in every other case, will depend upon this, whether if we apply the cesser clause to the particular breach complained of, and so hold the charterer to be free, the shipowner has any remedy for his loss. If he has, we should construe the cesser clause in its fullest possible meaning, and say that the charterer is released; but if we find that, by so construing it, the ship-

(1) 6 App. Cas. 38.
(2) 2 Q. B. D. 238.
(3) 15 Q. B. D. 247.
(4) 61 L. T. (N.S.) 330.
(5) 16 Court Sess. Cas. 4th Series, 658.

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owner would be left without any remedy whatever for the breach, then we should say that it could not have been the meaning of the parties that the cesser clause should apply to such a breach.

Lord Esher, M.R.

Now the breach complained of in the present case is a breach by the charterers in not loading, as the jury have found, in a reasonable time. If the charterers are not to be liable for that breach, has the shipowner any remedy in respect thereof? That depends upon whether in this charterparty the word "demurrage" in any sense, however large, can be applicable to this breach committed at the port of loading. To determine this we must look at the whole charterparty. The charterers are to load in the usual and customary manner a full and complete cargo of coals. An unreasonable delay would certainly be a breach of that part of the contract on the part of the charterers. Is there any demurrage in any sense applicable to that breach at the port of loading? It seems to me that there is none. There are no demurrage days mentioned, and there is no fixed sum payable for detention. When we come to the provisions applicable to the port of discharge, we find that the cargo is "to be unloaded at the average rate of not less than 100 tons per working day"—when we know the amount of the cargo that has to be unloaded, that clause gives a specific number of days for the unloading—"the charterers to pay demurrage at the rate of 4*d.* per ton register per diem except in case of unavoidable accident." That seems to me to come to this: The charterers are to have a number of days, which by calculation can be fixed immediately, for unloading the ship, and for all days occupied in unloading beyond that time they are to pay demurrage at the rate of 4*d.* per ton register per day. "Demurrage" is in express terms attached to the case of the unloading of the ship, and it would, in my opinion, be contrary to every fair mode of reading that clause to say that that demurrage, which is stipulated for in terms for delay in unloading, can be applied to delay in loading. We find, therefore, that there is no clause allowing demurrage at the port of loading, while there is such a clause referring to the port of discharge. Then we come to the cesser clause, "the charterers' liability

under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage." The word "demurrage" must mean demurrage as used in the charterparty; that is, as I have just stated, demurrage at the port of discharge, and the shipowner has no lien according to this charterparty in respect of detention of the ship at the port of loading. If that be the true construction of those words in the charterparty, then in respect of detention at the port of loading, if the cesser clause is construed so as to cover that breach, the shipowner will be left without remedy. According, therefore, to the canon of construction laid down, the cesser clause does not apply to the breach on which the plaintiff brings his action in this case, and the plaintiff is entitled to judgment.

Lord Esher, M.R.

There is an additional reason for not holding that there is a lien given by this charterparty for delay at the port of loading, namely, the inconvenience and difficulty arising from a lien in respect of an unascertained and unascertainable amount. As I have said, I do not think it is necessary to go through the cases. I desire only to strike once more at the decision in *Bannister* v. *Breslauer* (1), and to say that if that case is contrary to the view I have expressed, it seems to me to be contrary to the rules laid down in subsequent cases, and not to be supported.

BOWEN, L.J. I am of the same opinion. We have to construe a cesser clause which provides that on the cargo being loaded the charterers' liability is to cease. There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses as they generally come before the Courts are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of

(1) Law Rep. 2 C. P. 497.

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responsibility which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability. That is a sound principle of commercial reasoning, which has been sanctioned by the Courts in the cases cited to us, and which has been recognised in the chain of important and valuable judgments of the present Master of the Rolls. That being the principle of construction to apply, one would not expect to find a shipowner placing his ship and himself at the mercy of a charterer without some equivalent, or contracting on a given event to release the charterer from all liability unless there were some other mode of protecting himself against the act of the charterer.

Taking that as the principle to apply to this clause in this charterparty, the question is reduced to a simple one of construction. The lien is given, and if the lien is to be commensurate with the release of liability we shall be able to ascertain what is meant by the charterers' liability ceasing on the cargo being loaded by examining the extent to which the lien has been given. The clause provides that the owners are to have a lien on the cargo for freight and demurrage, and I proceed, therefore, to consider whether, upon the true construction of this charterparty, "demurrage" includes damages for detention at the port of loading. Now, the word "demurrage" has a primary and a secondary sense, and with regard to the construction of that word, I will take the language used by Cleasby, B., in *Lockhart* v. *Falk* (1)—a case which it is impossible, I think, to distinguish from the present—as expressing shortly that which no doubt is expressed in many other judgments, namely, the way in which we ought to deal with the question of interpretation. He says: "The word 'demurrage,' no doubt, properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charterparty containing the clause in question we must collect what is the proper meaning to be assigned to it." So far as to the meaning of the word "demurrage." It is an elastic word; it

(1) Law Rep. 10 Ex. 132, at p. 135.

has a strict sense, but it can be stretched beyond its strict sense. The learned Baron proceeds: "When the charterparty contains no clause allowing demurrage at a specified rate at all, it has been held that the word 'demurrage' in the exemption clause applies to detention, and that the charterer is discharged as soon as a cargo is on board. This was the case of *Bannister* v. *Breslauer*. (1)" The word "demurrage," therefore, having two meanings, we must look at the charterparty to see if it is used in the strict sense, or in the more popular and elastic sense. We have also this, that a lien is created, and primâ facie a lien is only created as a convenient means of obtaining payment of a liquidated sum or of a sum that may be liquidated and ascertained; and though the parties by the contract may provide that the lien shall extend to an unliquidated sum, nevertheless there is a primâ facie inconvenience in creating the lien to cover unliquidated damages for detention. So far as I know, all the cases, with the exception of *Bannister* v. *Breslauer* (1), where a lien has been held to cover damages for detention of a ship, are cases in which one can either directly or indirectly find in the charterparty some practical pecuniary measure by which the damages for such delay can be measured. If *Bannister* v. *Breslauer* (1) is to be supported at all, it must be upon the ground that no other meaning can be given to the word "demurrage" in that charterparty and no other extent to the lien to be created, than by including in the word "demurrage" damages for detention at the port of loading, so that such damages are covered by the lien.

With these observations, I pass on to the remainder of the charterparty. One finds that the word demurrage is used in the previous clause of the charterparty in its strict sense as an agreed payment for detention or delay at the port of discharge. There is no similar provision at all with regard to demurrage at the port of loading. When, therefore, we come to the cesser clause, we ought to assume that that clause only discharges the charterer from liability with respect to those matters that come under the head of demurrage in the sense previously used in the charterparty—a sense the more convenient and the more natural—and

(1) Law Rep. 2 C. P. 497.

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does not extend to unliquidated damages for detention at the port of loading. I do not think it necessary to go through the cases when once one has extracted from them the principle of reasoning attributable to this kind of contract—a principle which may be called a practical canon of construction.

FRY, L.J. I am of the same opinion. The rule that we are primâ facie to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charterparty the breach of which would create a legal liability; there would then be a cesser clause destroying that liability; and there would then come a lien clause which did not re-create that liability in anybody else. What would be the use of a stipulation if the moment it was created it was taken away, and was not laid upon some one else's shoulders? Such a construction would strike anyone as being most unreasonable, and therefore it is not one which the Court ought to adopt unless absolutely driven to it. We must accordingly read the two as co-extensive, if they can reasonably bear that interpretation. As was pointed out by Amphlett, B., in *Kish* v. *Cory* (1): "There are two ways, and two ways only, in which that injustice could be remedied: either to say 'the charterer's liability to cease' does not go beyond the freight and demurrage properly so called, which are subject to the lien; or to say that demurrage, where mentioned in the lien clause, includes what may properly be called detention."

The question, therefore, remains as to the meaning of the word "demurrage" in the cesser clause. As has been already pointed out—and I need not add anything to what the Master of the Rolls and the Lord Justice have said upon this point—that word has a strict legal signification and a popular signification. That being so, we must consider what is the meaning of "demurrage" as used in this charterparty. Is there any reason here why we should depart from the strict and proper meaning of the word?

(1) Law Rep. 10 Q. B. 553, at p. 563.

We find in this charterparty provisions with regard to loading; we find no provision there with regard to demurrage. The result is that there may be detention, but there is no demurrage. There are provisions with regard to the port of discharge, and we find demurrage is there provided for in terms. It appears to me to plainly follow that there is no reason for extending the word "demurrage" beyond its proper signification, and the word as used in the lien clause is applied to that which is described as demurrage in the previous provisions of the charterparty, namely, demurrage at the port of discharge. There is this further reason, which has been already referred to, that except we are driven by the stress of the language used, we should not be inclined to apply the lien to unliquidated damages.

There is one further remark that I desire to make. I think this cesser clause lends itself easily to the restricted meaning. The clause does not say that all the charterer's liability is to cease, nor simply the charterer's liability, but the charterer's liability under the charterparty. Those words, "under this charterparty," seem to my mind rather addressed to payments which are to be made in accordance with the provisions of the charterparty than to unliquidated damages which might be obtainable for the breach of it. Though I should arrive at the same conclusion if those words were not in the charterparty, still, to my mind, they make the restricted construction of the cesser clause specially applicable.

Appeal dismissed.

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendants: *Radford & Frankland.*

A. M.

1891
Jan. 23.

WENMAN *v.* LYON & CO.
HONEYWILL, CLAIMANT.

Bill of Sale—"*Marriage Settlement*"—*Agreement for*—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer . . . . and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels . . . . shall be conferred, but shall not include . . . . 'marriage settlements'":—

Held, that a memorandum of agreement for a marriage settlement, although informal and not under seal, was a "marriage settlement" within the exception in s. 4, and not a "bill of sale."

APPEAL from Brighton County Court.

It appeared that the plaintiff had brought an action in the High Court against the defendants, who recovered judgment against him with costs, and under a fi. fa. seized certain furniture which was claimed by the trustee of his wife's marriage settlement. An interpleader issue was directed to try the right to the goods, and remitted for trial to the county court.

At the trial the claimant produced as the settlement a memorandum of agreement of May 3, 1890, whereby, after reciting that a marriage was intended shortly to be solemnized between the plaintiff and Jessie Elizabeth Honeywill, it was agreed and declared that if the intended marriage should take effect, all the real and leasehold property, and all personal chattels and effects of which the plaintiff was then possessed, or to which he was then entitled, should be assigned to the trustee, upon trust to pay the income to the wife during her life for her separate use subject to certain powers of appointment therein contained and subject to the life interest and powers of appointment, upon trust for the children of the marriage, and subject as aforesaid on trust for the plaintiff, his executors, administrators, and assigns absolutely. And it was thereby agreed that the plaintiff should and would at any time after the solemnization of the intended marriage, and immediately upon the request of the wife, sign, seal, and deliver a proper deed of settlement of the

aforesaid property, such settlement to contain such clauses and provisions as the solicitors (therein named) for all the parties thereto should deem necessary and proper for carrying the aforesaid trusts into effect.

The county court judge decided that the agreement did not require registration under the Bills of Sale Act, 1878, being within the exception contained therein, and that the claimant had a right to the goods.

Henn Collins, Q.C., and *Lewis Edmunds*, for the execution creditor. The memorandum of agreement is a bill of sale within s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict, c. 31.) It is within the terms of the first part of the section, and is not a "marriage settlement" within the words of the latter part, which specifies the instruments which are excluded from its operation. When the legislature intended to comprise instruments conferring a right in equity they used apt words, as in the inclusive part of the clause. No such words are used in the exclusive part.

Rawlinson, (*Jelf, Q.C.*, with him), for the claimant. By the Bills of Sale Act, 1878, s. 4, "The expression 'bill of sale' shall include bills of sale, assignments . . . . and other assurances of personal chattels . . . . and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents, that is to say . . . ., marriage settlements." It has been held that "settlement" in s. 47 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), may include any disposition of property for the enjoyment of some other person: per Cave, J., *Re Player*. (1)

The object of the Bills of Sale Act, 1878, s. 4, was to exclude any settlement made in consideration of marriage. An agreement for a settlement is equivalent to a settlement, as an agreement for a lease is equivalent to a lease: *Walsh* v. *Lonsdale* (2); if specific performance would be granted: *Swain* v. *Ayres* (3);

(1) 15 Q. B. D. 682. (2) 21 Ch. D. 9.

(3) 21 Q. B. D. 289.

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Strong v. *Stringer*. (1) Specific performance of this agreement for a settlement would be granted in equity. It was entered into bonâ fide, as the county court judge has found. [He was stopped.]

Henn Collins, Q.C., in reply. The decisions on the Conveyancing Act, 1881, as to agreements for a lease do not apply to the Bills of Sale Act. The principle of those cases is in favour of the execution creditor, for they shew that a test of the right to specific performance which might render an agreement equivalent to a lease is the conduct of the parties. But how can their conduct be ascertained within the purview of the Bills of Sale Act? The instrument is or is not a bill of sale at the time when it is made.

POLLOCK, B., after determining other questions in the case, said:—Is this agreement a bill of sale within the 41 & 42 Vict. c. 31? The Bills of Sale Act, 1878, s. 4, gives an exhaustive description of what shall be included in the expression "bill of sale." It "shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-money of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred"—that shews that the legislature intended to deal with, not only all documents conferring legal rights but, documents by which equitable rights may be conferred—"but shall not include the following documents—that is to say," amongst others, "marriage settlements." It is suggested in argument that the legislature, having specified equitable assignments in the first part of the section and not in the second, could not have intended to exclude not only "marriage settlements," but agreements for a marriage settlement. I am, however, not so much impressed with that argument when I remember that those who framed the section used very comprehensive language to include in the affirmative

(1) 5 Times Rep. 638.

part all instruments which might properly be treated as a bill of sale. "Marriage settlement" is a well-known term, and in my opinion the object of the Act was not to include one form of such instrument and exclude another, but to secure to marriage settlements the position which they in reality hold, viz., of instruments the intention and effect of which is not that of mere assignments of goods from one person to another, but to create a trust for the purpose of carrying out a provision for a marriage. I am not much assisted by the analogy drawn from cases in which it has been decided, in effect, that the word "lease" includes an agreement for a lease. No doubt the authorities cited are strong; but the distinction was pointed out that in all such cases the surrounding circumstances, and not merely the document itself, must be considered before equity will put the parties to the mere agreement into as good a position as if an instrument perfectly effective at law had been executed. We have a more analogous case upon s. 47 of the Bankruptcy Act, 1883, which was founded on somewhat similar considerations to those on which the Bills of Sale Act is based, *Re Player* (1), where the learned judges seem to have been of opinion that the word "settlement" in the Bankruptcy Act might include an instrument of the kind now in question.

CHARLES, J. I am of the same opinion. I appreciate the force of the argument against the suggested analogy between the present case and that of agreements for leases under the Conveyancing Act; I do not think such analogy exists. Sect. 4 of the Bills of Sale Act could not be construed according to the manner in which the parties conducted themselves after making the instrument. I think that the language of Cave, J., in *Re Player* (1) applies to this case, and is exactly applicable to the construction which we ought to place on s. 4 of the Bills of Sale Act, 1878, and that the words "marriage settlement" therein used include marriage articles, although in form they are not drawn out fully as a marriage settlement.

Judgment for claimant.

Solicitors for execution creditor: *Stokes, Saunders, & Stokes.*
Solicitor for claimant: *W. F. Stokes.*

J. R.

(1) 15 Q. B. D. 682.

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Feb. 5;
March 21.

[IN THE COURT OF APPEAL.]

BECKETT *v.* TOWER ASSETS COMPANY.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9—*Hiring and Purchase Agreement.*

The plaintiff, being in want of money and in arrear with his rent, applied to the defendants for a loan on the security of goods. It was arranged between them that he should get his landlord to put in a friendly distress for the rent, and that the defendants should purchase the goods distrained from the broker. A distress was accordingly put in. The goods distrained, which, by agreement between the parties, included the tools of the plaintiff's trade, and which were found by the jury to be worth 63*l.*, were appraised at 29*l.* 5*s.* The plaintiff signed a memorandum requesting the broker to sell the goods at the condemned price to the defendants, there being an understanding that a hiring and purchase agreement should afterwards be made, by which the plaintiff should be entitled to repurchase the goods on terms to be fixed by such agreement. The defendants thereupon paid to the broker the sum of 29*l.* 5*s.* A hiring and purchase agreement was subsequently executed, by which the defendants purported to let the goods to the plaintiff's wife on the terms that certain monthly instalments should be paid by the hirer until the total amount of 50*l.* was paid, and that the defendants should have power to seize the goods for default in performance of the terms of the agreement by the hirer. The defendants subsequently seized the goods for such default. The plaintiff brought an action in respect of such seizure:—

Held (reversing the judgment of Cave, J.), that the true inference of fact from the arrangement made between the parties and the whole of the circumstances was that the parties really intended that there should be in form a sale of the goods under the distress, but that the beneficial interest in the goods should not pass to the defendants until a hiring and purchase agreement was executed, and that till then there was a trust in favour of the plaintiff; that, under the above circumstances, the defendants had not a title to the goods independently of the hiring and purchase agreement; that such agreement amounted to a bill of sale within the Bills of Sale Act, 1882, and, not being registered, was void; and that, therefore, the plaintiff was entitled to succeed.

Appeal from the judgment of Cave, J., in favour of the defendants.

The action, which was for trespass to goods, came on for trial before the learned judge with a jury; but it was arranged that the jury should assess the damages contingently, and all other questions should be determined by the judge without a jury.

The facts are fully stated in the judgment of the learned judge in the report of the case in the Queen's Bench Division. (1)

For the purposes of this report they may be briefly summarised as follows:—

It appeared that the plaintiff, being in arrear with his rent, applied to the defendants for a loan of 30*l.* on a bill of sale. The defendants made an inventory of his goods, including the tools of his trade; but they recommended him not to give a bill of sale, but to arrange with his landlord to put in a friendly distress, in which case they would buy the goods from the broker. The plaintiff assented, and requested the landlord to do so. A distress was accordingly put in for 25*l.* rent in arrear, and the goods (which were found by the jury to be worth 63*l.*) were appraised by two sworn brokers at 29*l.* 5*s.* The plaintiff subsequently signed a memorandum requesting the broker to sell the goods to the defendants at the condemned price, there being then, the learned judge found, an understanding between the parties that the plaintiff should be allowed to repurchase the goods on the hire-purchase system on terms which had not then been definitely agreed upon. The defendants thereupon paid the broker 29*l.* 5*s.* and got a receipt from him. The next day, by previous arrangement with the defendants, the plaintiff brought his wife to their office, when a hiring and purchase agreement from the defendants to her was produced for her signature. By the terms of that agreement the hirer was to pay the defendants 1*l.* 8*s.* a month until 50*l.* was paid, and was to pay all rent in respect of the house in which the goods were; and, in case the hirer should make default in payment of any money payable under it, the defendants might enter and take possession of the goods. On reading the document the plaintiff objected to paying what amounted to 50*l.* for an advance of 29*l.* 5*s.*, on which the defendants' representative said: "You can please yourself; we have bought the goods, and you know whether they are worth 50*l.* or not." The plaintiff, "seeing," as he said, "how he was placed," told his wife to sign the agreement, which she did; and he signed another document, guaranteeing due payment of the instalments. The defendants afterwards seized the goods for

(1) Ante, p. 1.

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default in payment of rent of the house. The hiring and purchase agreement was not registered under the Bills of Sale Acts. The learned judge gave judgment for the defendants, on the ground that the transaction was in effect a sale by the plaintiff to the defendants, subject to a right of repurchase on the terms which would have been imposed in the case of a mortgage, and that the hiring agreement was not a bill of sale.

Henn Collins, Q.C., and *W. E. Hume Williams*, for the plaintiff. The sale under the distress was obviously a mere sham as between the plaintiff and the defendants. The mode in which the transaction was carried out in all its details shews it to have been so. If so, the property in the goods, or, at any rate, the beneficial interest, remained in the plaintiff before the hire and purchase agreement was executed; and therefore the title of the defendants really depended on that agreement, and, though in form a hire and purchase agreement, it was in reality a bill of sale given as a security for payment of money, and void for want of registration, under the Bills of Sale Act, 1882, like the hiring agreement in *In re Watson*. (1) It is well settled that the fact that the form of the transaction is that of an absolute sale or assignment, followed by a hiring agreement, does not prevent the Court from looking into the real nature of the transaction, and deciding that a document is a bill of sale, if really given to secure payment of money: *Madell* v. *Thomas* (2); *In re Watson*. (1) The question is whether the plaintiff really intended that the goods should be sold to the defendants out and out under the distress. The distress was a mere form, as is shewn by the fact that tools of the plaintiff's trade which under the circumstances were not distrainable (3) were included in it. Again, the price at which the goods were appraised was much below the true value, and was obviously arranged to correspond with the amount advanced, there being no real appraisement. Is that compatible with the idea that there was a real intention to part with the goods absolutely? The whole transaction was merely a complicated mode of effecting a security for money so as to evade the

(1) 25 Q. B. D. 27.
(2) [1891] 1 Q. B. 230.
(3) See the findings of the jury as to the value of the goods distrained other than tools of trade, ante, p. 5, and 51 & 52 Vict. c. 21, s. 4.

Bills of Sale Acts. Looking to the substance of the transaction, the supposed hiring agreement was essential to the defendants' title, and was therefore a bill of sale, and, not being registered, is void. Therefore the defendants had no title to the goods.

Secondly (1), the breach of the condition of the hiring agreement, for which the defendants seized on June 24, was non-payment of rent of the premises due to the landlord. The condition cannot be construed as entitling the defendants to pray in aid a breach of it already waived. The defendants accepted an undertaking from the landlord that he would not distrain for any of the rent due down to June 24, if the plaintiff gave up possession of the premises on or before that date. It is contended that that was a waiver of any breach of the condition down to the end of that day. There was no rent due or payable within the meaning of the condition before the end of that day, if the landlord for good consideration waived his right till then.

Sir Horace Davey, Q.C., and *Cock, Q.C.* (*Herbert Reed*, with them), for the defendants. It is difficult to understand exactly what is meant by the statement that the parties intended to evade the Acts. If a transaction can be legally carried out by such means as do not come within the terms of the Bills of Sale Acts, there is nothing to prevent the parties from so carrying it out, and it will not be avoided by the Acts, although, when it is completed, exactly the same result will be produced which would have been produced if there had been a bill of sale. It is argued that the hiring and purchase agreement was a bill of sale and required registration because the parties did not really intend the transaction to be in substance what it was in form. How is the intention of parties to a transaction to be ascertained otherwise than by the legal effect of the instruments which have been executed? Undoubtedly, where there was mistake, or where one party had been deceived or tricked into executing a document, which did not express his real intention, equity

(1) The facts with regard to this point will be found in the report of the case below, ante, p. 1. It has not been thought worth while to repeat them here, as no definite opinion was ultimately expressed by the Court on the point.

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would give relief in an action brought to set aside or reform the document. But in the absence of any suggestion that either party has been deceived, or of mistake or anything of that sort, and in an action where there is no claim to set aside or reform the document, it is difficult to see how the Court can be at liberty to disregard the legal effect of, or, as it has been expressed, to go through the document and to ascertain the intention of the parties aliunde. Take the case where an assignment absolute in point of form has been executed, but the parties only really intended a mortgage: the utmost extent to which a Court of equity would interfere with the legal effect of the instrument would be by ordering that it should stand only as a security for the amount advanced. If a transaction takes place or a document is executed the legal effect of which is to pass the property in goods, subject to the equity before alluded to, it does pass the property.

[LORD ESHER, M.R. I do not see that this point is really open in this Court, having regard to the decision in *Madell* v. *Thomas*. (1)]

At any rate, in order to entitle the Court to give to a transaction a different effect from that which its form imports, there ought to be absolutely clear evidence of an intention contrary to that imported by the form. There is no such evidence here; on the contrary, it is submitted that the evidence shews that the parties did intend the transaction actually to be what its form imported. In *Yorkshire Wagon Company* v. *Maclure* (2) the inference of fact was drawn, that, as the railway company had no power to borrow money, the intention must have been that there should be an out and out sale followed by a hiring and repurchase agreement. So here it is shewn clearly that the parties did not intend a transaction that would be within the Bills of Sale Acts. The defendants contend for the following propositions: (1.) If parties can effect their object, viz., an advance of money on security of chattels, in two modes, either by giving a bill of sale or by means of a sale or other transfer of the property in the goods by the party receiving money to the party advancing it, followed by a hiring and repurchase agreement, they are quite

(1) [1891] 1 Q. B. 230. (2) 19 Ch. D. 478.

at liberty, notwithstanding the Bills of Sale Acts, to adopt the latter mode, though it produces exactly the same result in the end as the former. (2.) If it appears from the evidence, as it does here, that the parties deliberately intended to avoid the publicity caused by registration, and therefore adopted the second mode of carrying out their object, the presumption is that they intended that which would carry out their intention, not that which would not do so, but would bring them within the Acts. (3.) The Court is not entitled to infer in such a case an intention other than that shewn by the form of the transaction, except on evidence clearly shewing that such was the intention of both parties. It is not enough to shew that the party transferring the goods only intended a mortgage, not an out and out sale, if the other party intended a sale, except in the case where the transferor is tricked and brings an action to reform the instrument, in which case equity would order it to stand as security for the amount advanced. Here there is no such evidence; on the contrary, the evidence points to the conclusion that both parties, at any rate the defendants, intended a real sale. The fact that the sale was effected under a friendly distress is cogent evidence of this, though it might have been better to sell directly.

[BOWEN, L.J. May not the result of the evidence be that the parties only intended that there should be the appearance of an out and out sale? It is difficult to see how a person could be supposed to be intending to part out and out with goods which appear from the verdict of the jury to be worth 63*l.* for 29*l.*]

With regard to the contention that the seizure of the goods for breach of the conditions of the hiring agreement was premature, it is undisputed that the condition was not complied with, and that rent was due. Moreover, the condition was to produce receipts for rent, and no receipt was produced in this case.

Henn Collins, Q.C., in reply.

Cur. adv. vult.

March 21. The following judgments were delivered:—

FRY, L.J. Lord Justice Bowen has asked me to deliver judgment first in this case. This is an appeal from a decision of

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Fry, L.J.

Cave, J. The action was for trespass to goods in respect of the seizure of them by the defendants under the terms of a document alleged by the plaintiff to be a bill of sale. The jury assessed the damages provisionally. The learned judge, however, reserved certain questions of law arising in the case, and ultimately held that the plaintiff's title to the goods was not made out; that the document under which the defendants seized the goods was not a bill of sale, and therefore did not require registration; and, consequently, that the action failed. The facts are very fully stated in the judgment delivered by the learned judge, and I accept his statement of them. Briefly, it appears that in 1888 the plaintiff was desirous of borrowing money, and that he owed rent to his landlord. He saw an advertisement issued by the defendants; he went to their office; and originally it was proposed that he should give a bill of sale or some such security upon his goods. It was subsequently suggested that a friendly distress should be put in by the landlord, and that under that distress a sale should be made to the defendants. The plaintiff consented to tools of his trade, which were not by law subject to distress, being included in the distress. It was arranged that afterwards a hire and repurchase agreement should be executed. Such was the general scheme of the transaction. The question arises whether the defendants had a good title to the goods independently of the hiring and repurchase agreement, or whether they had no such title, and therefore the agreement required registration. A great deal of argument was addressed to us on the question how far the Court must look into the real transaction between the parties, and how far such an inquiry may bear on the operation of the Bills of Sale Acts. Upon principle, that is to say, on the plain construction of the statute, it seems to me clear that, in considering whether the Bills of Sale Act applies the Court not only may, but must inquire into the real nature of the transaction. For example, the question whether a document is within the Act of 1882 depends on the inquiry whether it was given by way of security for the payment of money. This is not a question of form, but of fact. If it be found to have been so given, then it is within the Act, however absolute the assignment of the goods may be in form. That is

the case of *Madell* v. *Thomas* (1), where the document was absolute in form, but was shewn in fact to have been given by way of security for money. Again, the real truth of the transaction must be applied to the construction of documents for the purposes of the Act, and, if a document, construed according to the true nature of the transaction, be within the Act, then it will not be protected by its form. Therefore, if A. be the real owner of goods and B. be their pretended owner, and B. purports by a document to let them to A., reserving liberty to seize them in certain events, this may be construed as a licence to seize the goods given by their real owner A. to B., and, if really given by way of security for payment of money, requires registration. This is the decision in *In re Watson*. (2) On the other hand, if the defendants really have a title to the goods by some transaction independently of any document, and afterwards a document is executed which would come within the definition of a bill of sale, if their title depended upon it, the non-registration of that document will not deprive them of their independent title. It was argued that the defendants in the present case had such an independent title. I agree with Cave, J., that, whether that was so or not, depends on the real intention of the parties, and that, in determining what their real intention was, we must have regard to both the form and the substance of the transaction, to the position of the parties, and to the whole of the circumstances under which the transaction came about. Here the transaction appears to me to derive its force from the assent of the plaintiff to the distress. The distress was a friendly, and, indeed, might almost be deemed a sham, distress. It included tools of the plaintiff's trade which were not distrainable by law, and the validity of the seizure of which under the distress must depend on the consent of the plaintiff. Again, the valuation does not appear to have been a real valuation, the goods being valued at the exact amount which was advanced to the plaintiff. It seems to me that the effect of the whole transaction depended on the intention of the plaintiff in consenting to it. I think that the true conclusion from the facts is that it was agreed between the plaintiff and the defendants

(1) [1891] 1 Q. B. 230. (2) 25 Q. B. D. 27.

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that there should be a sale in form to be followed by a repurchase agreement; that the sale was to be in appearance absolute, but to operate as a sale if and when the repurchase agreement was executed; but that, if such agreement was not executed, then the beneficial interest was not to pass: in other words, that the intention was that the legal interest should only pass subject to a trust in favour of the plaintiff, if no subsequent repurchase agreement were executed. To illustrate my meaning, let me take the intermediate period between the hour on October 17, when the supposed sale took place, and the hour on October 18, when the repurchase agreement was executed. How did things stand during that period? If the defendants had refused to execute any repurchase agreement, could they have held the goods against the plaintiff with whom they had arranged for such an agreement? Is it not clear that he might in that case have recovered the goods from the defendants on repayment of the advance? It appears to me that the plaintiff might so have recovered the goods if the defendants had refused to execute a repurchase agreement. I conclude, upon the facts, that it was the intention of both parties that the legal estate in the goods should pass by the sale, but, nevertheless, that it should pass subject to a trust, until a repurchase agreement was executed. It follows that no such independent title as suggested existed in the defendants, because the beneficial interest remained in the plaintiff until the repurchase agreement was executed. The defendants then cannot make a title to the beneficial interest in the goods, except under the repurchase agreement, and that document being a bill of sale is void for want of registration: consequently the title of the defendants to the goods is not made out, and the plaintiff is entitled to recover. On these grounds, I think that the conclusion of the learned judge was erroneous in not giving effect to the trust which arose upon the true nature of the transaction. I do not fail to observe that he relied upon the language used by the plaintiff before the execution of the repurchase agreement when he said that he saw how he was placed. But it seems to me that that language only shews that the plaintiff was a man not skilled in law, and ignorant of his legal rights, and

that he submitted to pressure rather than enter on litigation. I think that the learned judge placed too much reliance on the language used. For these reasons I think we must arrive at a conclusion opposite to that arrived at by the learned judge below.

There is another ground on which I incline to think that the judgment of the learned judge was erroneous, though I do not propose to give a definite opinion on that point. The defendants justify their seizure of the goods under the bill of sale by reason of the plaintiff's default in payment of rent to his landlord. It seems to me that there was considerable evidence to shew that there was a course of dealing between the parties which would preclude the defendants from availing themselves of that default. From December, 1888, to June, 1889, there had been a series of undertakings given by the landlord not to distrain until a certain day; and these had been accepted by the defendants. The landlord had given such an undertaking down to June 24, 1889, and the defendants had inquired of him whether it would be enlarged. Finding that no further undertaking would be given, they entered and seized on June 24, when such undertaking was still in force. This point was not very much argued, and it is unnecessary to decide it. I only say that it appears to me doubtful. The judgment for the defendants must be set aside and judgment entered for the plaintiff for the amount of the damages found by the jury.

BOWEN, L.J. I am of the same opinion, and will only add a few words to what has been said by my brother Fry. In considering the question whether in any particular case the Bills of Sale Acts come into operation, it is necessary to bear in mind that the Acts do not avoid transactions but documents. The inquiry, therefore, must begin with the question whether the document itself that is under discussion is a bill of sale within the definition given by the Acts, for which purpose we must examine it by the light of the circumstances of the case. The next question is whether there is or is not a transaction which may stand at law and equity apart from the document, although the Act would avoid the mere document as a bill of sale if the

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document stood alone. That second question depends on considerations of law apart from the Bills of Sale Acts. In dealing with these questions, we must consider the true nature of the transaction. To my mind, the whole of the transaction in this case antecedent to the hiring agreement might be considered to be a sham without any intention that the property should pass, but for one matter alone, which is that the title to the goods depended not only on the act of the plaintiff, but also on that of a third person, viz., the landlord. This cannot be said to have been a sham sale so far as he was concerned. All the title that the landlord could give he did give; but, assuming that the legal property and, so far as the landlord was concerned, the beneficial interest in the goods, did pass to the defendants, it seems to me, nevertheless, that we ought to find on the facts that there was an understanding between the plaintiff and the defendants that, although the property passed, the defendants should hold it in trust for the plaintiff, except so far as the rights of the parties should afterwards be defined by some document of hiring and repurchase, or other document of that sort, to be afterwards executed. If so, the goods remained, so far as the beneficial interest in them was concerned, the property of the plaintiff, though in law the property in the goods had passed to the defendants. That seems to me to place the defendants in this dilemma. If the beneficial property in the goods was only to become theirs when some further assurance was executed, then the hiring and repurchase agreement which was executed is such a document as is avoided by the Act if not registered. Again, if it operated only as a licence to seize goods which remained in equity the property of the plaintiff, so far as the beneficial interest was concerned, then also it is avoided by the Act. So that in either view it is a document which is a bill of sale; it is a necessary part of the transaction in order to give the defendants a title to the goods, for without it they were only trustees for the plaintiff. I am glad to think that we are only differing upon a question of fact from the learned judge in the Court below, to whose summary of the cases and the law I desire to state my own obligation; and, so far as the facts are concerned, it does not appear to me that the precise inference which we are now drawing

was ever presented to him in argument. I should add that the Master of the Rolls concurs in the result at which we have arrived.

Appeal allowed.

Solicitor for plaintiff: *Pumfrey.*

Solicitors for defendants: *Evans & Batchelor.*

E. L.

IN RE LOUIS. EX PARTE THE INCORPORATED LAW SOCIETY.

April 9 10.

Solicitor—Unqualified Person—Process-server employed by Solicitor—Settlement of Affidavit—6 & 7 Vict. c. 73, s. 2—23 & 24 Vict. c 127, s. 26.

A person employed by a solicitor as a process-server, who settles the affidavits of persons in his employment relating to service of process, does not by so doing act as a solicitor within the meaning of 6 & 7 Vict. c. 73, s. 2, so as to be liable to attachment for contempt of Court under 23 & 24 Vict. c. 127, s. 26.

APPLICATION at the instance of the Incorporated Law Society for an attachment under 23 & 24 Vict. c. 127, s. 26, against A. H. Louis, an unqualified person, for contempt of Court in acting as a solicitor contrary to 6 & 7 Vict. c. 73, s. 2. It appeared that the defendant carried on business in London as a law stationer, confidential agent, and process-server. The alleged offence was his having settled the affidavit of a person employed by him, which had been used upon an application for an order for substituted service made by the solicitors for the plaintiffs in an action.

Channell, Q.C. (*Hollams,* with him), in support of the motion. The defendant is liable to attachment for contempt of Court under 23 & 24 Vict. c. 127, s. 26. He has been guilty of "acting as a solicitor" within 6 & 7 Vict. c. 73, s. 2. (1) No one

(1) By 6 & 7 Vict. c. 73, s. 2: "No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend, any action, suit, or other proceeding in the name of any other person, or in his own name, in any Court, &c., or act as an attorney or solicitor in any cause, matter, or suit, &c., unless admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor."

By 23 & 24 Vict. c. 127, s. 26: "Every person who acts as an attorney or solicitor, contrary to s. 2 of 6 & 7 Vict. c. 73, &c., shall be deemed guilty of a contempt of the Court in

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but the solicitor in the case or his clerk ought to be allowed to settle an affidavit in support of an ex parte application for substituted service. The Court is entitled to assume upon such an application that the truth of the statements deposed to has been tested by the solicitor who brings them before it. In *Law Society* v. *Shaw & Waterlow* (1), Brett, L.J., treated the preparation of affidavits as essentially the work of a solicitor. By s. 60 of the Stamp Act, 1870, any unqualified person "who draws or prepares any instrument .... relating to any proceedings in law or equity," is liable to a penalty.

Finlay, Q.C. (*Pollard*, and *E. C. Robinson*, with him), for the defendant. It is not contended that in settling the affidavit the defendant did any act which is specifically prohibited by 6 & 7 Vict. c. 73, s. 2. It is not likely, therefore, that the general words of the section were intended to prohibit him from doing what he did. In settling the affidavit he was acting for the solicitor by whom he was employed, and was not himself acting as a solicitor. It could not be contended that a solicitor's clerk could be made liable to a penalty under s. 60 of the Stamp Act, 1870, and the defendant would be exempt for the same reason. Had the facts contained in the affidavit been deposed to orally at chambers, there would have been no pretence for this application.

Channell, Q.C., in reply.

MATHEW, J. I am of opinion that this motion must be dismissed, as the defendant has not been shewn to have been guilty of any contempt of Court. It is said that he has "acted as a solicitor" within the meaning of 6 & 7 Vict. c. 73, s. 2. That section specifies certain acts which no one is to be permitted to do unless he be a solicitor, and adds, "or act as an attorney or solicitor in any cause, matter, or suit." It is not contended that the defendant has committed any of the specific

which the action, &c., in relation to which he so acts is brought, and may be punished accordingly."

By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 60: "Any person who, not being a .... certificated attorney, solicitor, &c. .... draws or prepares any instrument relating to real or personal estate, or any proceedings in law or equity, shall forfeit the sum of 50*l*."

(1) 9 Q. B. D. 1, at p. 12.

acts which are prohibited by the section; but it is contended that he has "acted as a solicitor" within the general words. It appears that he has been carrying on the business of a process-server—we are not concerned with his transactions in any other capacity—and that he has carried on this business in entire good faith, and has been employed by solicitors of undoubted respectability. It appears also that it has been part of his duty in his employment as a process-server, when a writ has been served and when there has been a failure to effect service of a writ, to prepare in each case the usual affidavit for the use of the solicitor by whom he has been employed. This has been the course of business. Now, in the preparation of the affidavit of service, where service has been effected, can it be said that the defendant has acted as a solicitor? The learned counsel for the Law Society hesitated as to this, and with reason, because as regards this affidavit it is plain that the defendant has acted, not as a solicitor, but for a solicitor and as a witness. Then, can any reasonable distinction be drawn between the case where an affidavit of service is made, and the case where an affidavit is made of facts shewing why personal service was not effected? The learned counsel for the Law Society urged that, in the latter case it is necessary to have the assistance of a solicitor, in order that there may be a proper cross-examination of the person who states the facts with respect to the failure to effect personal service. But how could there be any effective cross-examination in such a case? The solicitor could only act upon the statement of the person employed to serve the process; and here, in place of the old process-server with his strange proceedings, we have a person of undoubted respectability and character, who may be expected to employ only persons on whom reliance can be placed. In this case, therefore, as in the other, as it appears to me, the defendant has acted for a solicitor and in the capacity of a witness. It was not disputed that if, in place of the affidavit being produced, the person employed to effect service were himself to state at chambers what had occurred, there could be no pretence for saying that in so doing he was acting as a solicitor. I think that the defendant in settling this affidavit, did no more than make such a statement, and I cannot

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think that any additional security would have been afforded by his having had the assistance of a solicitor in the preparation of the affidavit. No single case has been referred to in which an affidavit prepared by the defendant has been used at chambers otherwise than by or on behalf of a solicitor, and the solicitor who makes use of such an affidavit is responsible for doing so, and is bound to satisfy himself before he uses it that the statements which it contains are, so far as he knows, true. I think, therefore, that no contempt of Court has been committed. The result is that the motion will be dismissed with costs.

DAY, J., concurred.

Motion dismissed.

Solicitor for the Incorporated Law Society: *E. W. Williamson.*
Solicitors for defendant: *Haynes & Claremont.*

H. D. W.

Feb. 10, 11; *March* 11.

[IN THE COURT OF APPEAL.]

REEVE *v.* GIBSON.

Practice—Costs—Action for Infringement of Dramatic Copyright—Recovery of less than 10*l.—Right of Plaintiff to Indemnity or Costs—*3 *&* 4 *Wm.* 4, *c.* 15, *s.* 2—5 *&* 6 *Vict. c.* 97, *s.* 2—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 116—*Order* XXII., *r.* 7—*Order* XLV., *r.* 1.

By 3 & 4 Wm. 4, c. 15, s. 2, any person who represents or causes to be represented a stage play without the previous consent of the proprietor of the right of representation is made liable for each representation to the payment of a sum not less than 40s. to the proprietor, together with double costs of suit. By 5 & 6 Vict. c. 97, s. 2, all enactments in public Acts as to double costs are repealed, "provided always that instead of such costs the party or parties heretofore entitled . . . to such double costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

The plaintiffs sued the defendant under 3 & 4 Wm. 4, c. 15, s. 2, to recover penalties for infringements of their dramatic copyright in a stage play; the defendant paid into Court 8*l.*, the amount of four penalties of 40s. each, and the amount so paid in was taken out by the plaintiffs in satisfaction. Upon taxation of costs, a master decided that the plaintiffs had recovered less than 10*l.* in an action of tort within the meaning of s. 116 of the County Courts Act, 1888, and were, therefore, not entitled to any costs:—

Held, by the Queen's Bench Division, that the plaintiffs' costs ought to be

taxed: by Wills, J., on the ground that the County Courts Act, 1888, did not apply, that the costs sought to be taxed were not costs in the ordinary sense, but were part of the statutory remedy, and that the plaintiffs were entitled to a full and reasonable indemnity under 5 & 6 Vict. c. 97, s. 2; by Vaughan Williams, J., on the ground that although the costs sought to be taxed were costs in the ordinary sense, the Court ought, in the exercise of its discretion, to make an order for costs:—

Held, by the Court of Appeal, that, assuming there was no distinction between an indemnity under 5 & 6 Vict. c. 97, s. 2, and costs in the ordinary sense, the Rules of the Supreme Court did not operate to repeal the provisions of special statutes giving special costs in particular cases, and that the plaintiffs were, therefore, entitled to have their costs taxed.

APPEAL from an order of the Queen's Bench Division (Wills and Vaughan Williams, JJ.), directing a master to tax the plaintiff's costs.

The facts were as follows: The action was to recover six penalties of 40*s.* each from the defendant, under 3 & 4 Wm. 4, c. 15, s. 2, for representing on six days a stage play, of which the plaintiffs were the proprietors, without their previous consent in writing. The defendant paid 8*l.*, the amount of four penalties, into Court, which was taken out by the plaintiffs in satisfaction of the cause of action in respect of which it was paid in. (1) The plaintiffs thereupon applied to a master to tax their costs upon the footing of an indemnity under 5 & 6 Vict. c. 97, s. 2, which, after abolishing double costs, grants to the person who would have been entitled to them such full and reasonable indemnity as to all costs, charges, and expenses as shall be taxed by the proper officer. The master refused to tax, being of opinion that as the plaintiffs had recovered less than 10*l.* in an action of tort, they were not entitled to any costs by virtue of s. 116 of the County Courts Act, 1888. The plaintiffs thereupon took out a summons at chambers for an order directing the master to tax the plaintiff a full and reasonable indemnity under the statute, which was referred by a judge at chambers to the Court.

(1) It was suggested on behalf of the defendant in the Court of Appeal, though not in the Divisional Court, that the plaintiff's costs could not be taxed, because the action was still alive in respect of two penalties, no notice of discontinuance having been given; but upon the plaintiff's counsel stating that the action had always been treated as being at an end, the Court of Appeal intimated that the case must proceed as though the claim for the two penalties had been formally abandoned.

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Feb. 10, 11. *Henn Collins, Q.C.*, and *Morton Smith*, for the plaintiffs. The double costs originally granted to a successful plaintiff under 3 & 4 Wm. 4, c. 15, s. 2, having been abolished by 5 & 6 Vict. c. 97, s. 2, the plaintiffs are entitled to what is now by virtue of that section the substitute for such double costs —that is to say, to a full and reasonable indemnity for all the costs, charges, and expenses to which they have been put in the action. The provisions of s. 116 of the County Courts Act, 1888, are inapplicable; the action is not one of contract or tort within the meaning of that section. The County Courts Act was not intended to cut down a statutory enabling provision; and the right to costs in the present case being a special statutory right, that Act does not apply.

Bankes, for the defendant. The case is within s. 116 of the County Courts Act, 1888. (1) The opening words of that section govern the whole section, and shew that it was the intention of the legislature to include in this section all actions that could have been commenced in the county court; the present action could have been so commenced, and it is an action of tort within the meaning of that section, and the plaintiffs, having recovered less than 10*l.*, are not entitled to any costs. The action is none the less an action of tort because it is founded on the provisions of a special statute.

Secondly, the provisions of 5 & 6 Vict. c. 97 as to costs are impliedly repealed by Order LXV., r. 1 (2), the effect of which rule is to sweep away all statutory provisions as to costs, "subject to the provisions of the Acts"—that is, the Judicature Acts, which contain nothing that keeps alive the provisions of 5 & 6 Vict. c. 97 as to indemnity in lieu of double costs.

(1) By s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43): "With respect to any action brought in the High Court, which could have been commenced in a county court, the following provisions shall apply: . . . (2.) If in an action founded on tort the plaintiff shall recover a sum less than ten pounds, he shall not be entitled to any costs of the action, . . . unless . . . a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court or a judge thereof at chambers shall by order allow costs."

(2) By Order LXV., r. 1: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or judge."

Even if 5 & 6 Vict. c. 97 is not repealed, the plaintiffs are entitled to no costs. They have availed themselves of the provisions of Order XXII., r. 7 (1), and have taken the money out of court in satisfaction, and all that they are entitled to do under that rule is to tax their "costs"; they cannot do this, for they are entitled to no costs, having recovered less than 10*l.* in an action that might have been brought in the county court.

Henn Collins, Q.C., in reply. The double costs given by the earlier statute, and the indemnity given by the later one, are not "costs" in the ordinary sense at all; they are a part of the statutory remedy given to the aggrieved party. The provisions of the County Courts Act have no application; they deal only with costs in the ordinary sense of the word, and do not touch a claim founded on the breach of a statutory obligation.

WILLS, J. I am of opinion that the plaintiffs are entitled to the order for which they ask. The foundation of their claim is the statute 3 & 4 Wm. 4, c. 15, which gives a right to recover in respect of an infringement of dramatic copyright a sum of money calculated upon one of three scales fixed by the Act; the scale applicable to the present case is a sum of not less than 40*s.* in respect of each unauthorized representation, a sum which was decided in *Adams* v. *Batley* (2) to be damages and not a penalty; further, a successful plaintiff became entitled under that statute to double costs of suit. Then came the statute 5 & 6 Vict. c. 97, which took away the right to double costs, and substituted a provision that instead of such costs the plaintiff should receive a full and reasonable indemnity to be taxed by the proper officer. The plaintiff's right depends upon whether he *recovers* the sum which he claims by way of damages under the Act of Wm. 4.

(1) By Ord. XXII., r. 7: "The plaintiff, when payment into court is made before delivery of defence, may within four days after the receipt of notice of such payment . . . . accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant . . . . and shall be at liberty, in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the Court or a judge shall otherwise order, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed."

(2) 18 Q. B. D. 625.

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How does he get it? Not by virtue of the common law, but under the statute; the sum is obtained by a legal process in which the plaintiff in the exercise of his statutory right comes into Court and proves his case and gets judgment, or else gets the sum by reason of the defendant having paid it into Court under Order XXII., r. 7; the latter is what has happened in the present case, and it seems reasonable to construe that as being a "recovery." It is argued on behalf of the defendant that if a part of Order XXII., r. 7, applies, the whole of it applies, and therefore he has a right to have his *costs* taxed, and nothing else—in which case, it is said, the County Courts Act is fatal to his claim; and that is so, if the subject-matter is such that the whole of the rule is capable of applying to it. The rule goes on to make a provision as to costs; but that means only the ordinary costs in an ordinary action, which has no special feature about it; the costs there dealt with must be costs receivable as incidental to the subject of relief. But it is not meant by that rule to deal with the subject-matter of 5 & 6 Vict. c. 97, which is indemnity, and not costs in the ordinary sense. There is a striking difference in the phraseology of s. 1 and s. 2 of that Act: by the former, which deals with local and personal Acts giving double costs, the usual costs between party and party are substituted for double costs; the meaning of this is past argument; the costs recovered are treated as ordinary costs; but in the latter section, which deals with the right to double costs arising under public Acts, there is a change of language which cannot be accidental, and which, I think, is quite natural, and the plaintiff gets a full and reasonable indemnity as to his costs, charges, and expenses. Primâ facie there would appear to be no particular reason for making a distinction between costs recoverable under local and personal Acts and those recoverable under general Acts, except perhaps the fact that general Acts, in contradistinction to local Acts, are founded upon large considerations of public policy. The question, however, is not why but whether the distinction has been made—a distinction which it is impossible to suppose is wholly accidental.

It seems to me that the language of s. 2 places a successful plaintiff under that section on a different footing from a plaintiff

who is receiving costs in the ordinary way in an ordinary action, and that what he gets is not costs in the proper sense of the word. Such an action as the present differs from an ordinary action in more respects than one. In ordinary actions there is no jurisdiction to award costs as between solicitor and client; they can only be awarded as between party and party; nor is there any jurisdiction to award costs amounting to an indemnity. The present case is, in my opinion, essentially different from that of a mere award of costs, and I am of opinion that the County Courts Act, 1888, and the rules and orders made thereunder, do not apply to it.

This decision relieves me from the necessity of discussing the question whether the action is one founded upon tort or upon contract; for the indemnity sought here is, in my opinion, not within the section relating to the ordinary costs of an action at all. I desire, however, to say, that I express no dissent from a recent decision that such an action came within neither description, but was an action under the statute to recover the sum given by the statute to a plaintiff whose copyright had been infringed. I think, however, that apart from that question, the plaintiffs are entitled to the indemnity which they seek. It is satisfactory to know that this question has already been twice decided at chambers in this way, and my recollection is, that it has been the invariable course of practice to allow these costs.

VAUGHAN WILLIAMS, J. I am also of opinion that this order must be made as prayed. It seems to me that it is a very wholesome practice that the Court, when asked to make an order, should decline to do so, unless the order is necessary; and, assuming that to be a right principle, I must confess that it seems to me that, if we are to act upon the reasons which my brother Wills has just given for his judgment, we ought not to make the order, for it seems to be unnecessary. I will, therefore, give my own reasons for arriving at the conclusion that the order should be made.

This is an action to recover statutory damages, and is brought under 3 & 4 Wm. 4, c. 15, the Act which deals with dramatic copyright—s. 2 of which provides that for every representation

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without the consent of the author or his assignee the offender shall be liable to the payment of an amount not less than 40*s.*, &c., to the author or other proprietor, to be recovered by him, together with double costs of suit. This enactment was amended by 5 & 6 Vict. c. 97, s. 2, which repeals all enactments as to double or treble costs in all public general Acts, and provides that, instead of such costs, the parties theretofore entitled to them are to receive "such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf." Now, it is said that costs so recoverable are not costs in the ordinary sense of the word, but are an indemnity, and that therefore they fall outside the scope of the County Courts Act, which defines generally the amount of costs to be allowed in certain specified cases where less than certain specified sums have been recovered. I am not sure, however, that this is the right conclusion to be drawn. I was at one time of opinion that it was the conclusion; but, inasmuch as it was held in the case of *Finlay* v. *Seaton* (1) (which has been acted upon ever since), that it was not necessary that the right to costs should appear on the record, and that it was not necessary that there should be any order for costs, it follows that the Court must have thought that these were costs in the ordinary sense of the word, and that the statute empowered the master, in cases falling within it, to apply the higher scale, and that the master must in each case judge whether it falls within the section. I am, therefore, not prepared to say that these costs are an indemnity so different in its nature from ordinary costs that the County Courts Act has no application.

The ground upon which I prefer to put my decision is this. These costs are costs in the ordinary sense, and, as they are costs, Order XXII., r. 7, applies. That being so, I am unable to get rid of the difficulty as to the County Courts Act in precisely the same manner as my brother Wills. As regards Order XXII., r. 7, I am not certain whether, when the money is paid into Court, the County Courts Act has any application. I am not sure whether a plaintiff who by that means recovered less than the

(1) 1 Taunt. 210.

fixed sum would not get his costs. But, whether he would or would not, there is a discretion in the judge to make an order for costs if he thinks fit, and therefore the plaintiffs in the present case exercised a wise discretion in applying for an order for costs. This is not the first occasion upon which parties have thought that an order was necessary to entitle them to costs where the sum recovered by acceptance of money paid into Court has been less than the sum named in the County Court Acts as entitling them to costs. The conclusion at which I have arrived is that these are costs within the meaning of Order XXII., r. 7, and that if the County Courts Act applies, the judge has a discretion to make an order for such costs if he thinks fit to exercise it. Upon the question whether such an order ought to be made in the present case, I am of opinion that it ought. Whether or not the money has been recovered in an action founded on tort, a very good reason for a judge ordering costs to be paid to the plaintiffs is to be found in the mere fact that the action is brought to recover damages, the amount of which is liquidated by statute. That seems to me a very good ground for certifying that the action has been properly brought in the superior Court. I concur, therefore, in thinking that this order should be made.

WILLS, J. I am rather inclined to agree with the criticism of my brother Williams, that the reasoning of my judgment goes to shew that this order is unnecessary, and I entirely concur with him that it is unwise to make unnecessary orders; but in this case there was a principle to be decided, and it could not have been presented to us in a less costly or more convenient way for our decision. I think that the right to these "costs" arises on the statute, and that the master, being satisfied by the production before him of the proceedings in the action, has every material before him to enable him to proceed to taxation. I will only add that, if this is a question of discretion, I should exercise my discretion in the same way.

Order for taxation.

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The defendant appealed.

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March 11. *Bankes*, for the defendant, argued as in the Divisional Court.

Henn Collins, Q.C., and *Morton Smith*, for the plaintiffs, were not called upon.

[During the argument of the defendant's counsel, the counsel for the plaintiffs drew the attention of the Court to *Hasker* v. *Wood* (1), as shewing that the provisions of special statutes as to costs were not overruled by the Rules of the Supreme Court.]

LORD HALSBURY, L.C. There can be no doubt about this case. If the action has come to an end, as we must assume it to have done, the provisions of 5 & 6 Vict. c. 97, s. 2, are unquestionably still in force. The distinction between costs and indemnity may be reconciled; what is given by the statute is an indemnity in respect of costs.

LORD ESHER, M.R. I am of the same opinion. Without going into the question of a distinction between indemnity and costs, and assuming no such distinction to exist, the case of *Hasker* v. *Wood* (1) is directly in point, and decides that the Rules of the Supreme Court do not overrule the provisions of special statutes giving special costs in particular cases. The plaintiff is clearly entitled to the order for taxation.

FRY, L.J. I am entirely of the same opinion.

Appeal dismissed.

Solicitor for plaintiffs: *Tilson.*

Solicitors for defendant: *Brown & Woolnough.*

(1) 54 L. J. (Q.B.) 419.

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[IN THE COURT OF APPEAL.]

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Husband and Wife—Separate Property of Wife—Restraint on Anticipation without Words creating Separate Use—Power to bind Separate Property—Separation Deed—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 3, 4.

A married woman cannot contract so as to bind her separate property, unless she has some separate property existing at the date of the contract; but, if she has such property, her contract will bind it, and also her after-acquired separate property.

Palliser v. *Gurney* (19 Q. B. D. 519) approved and followed.

A restraint upon the alienation or anticipation of income given to a woman is of no avail unless the income is given to her for her separate use; a gift to her separate use will not be implied from the mere existence of a restraint on anticipation.

Baggett v. *Meux* (1 Coll. 138) approved.

By a separation deed between husband and wife, the husband covenanted with the trustees of the deed that he would, during the joint lives of himself and his wife, pay to the trustees an annuity of 500*l*. And it was declared that the trustees should stand possessed of the annuity, during the continuance thereof, upon trust to pay the same to the wife "for her separate use, without power of anticipation." There was a proviso that, in case the husband should at any time thereafter obtain a decree absolute for a divorce against the wife in respect of any circumstances occurring after the date of the deed, or in case the wife should at any time thereafter be proved to be leading a notoriously unchaste life, the annuity should absolutely cease and determine:—

Held, that the separate use continued only during the joint lives of husband and wife, and that arrears of the annuity remaining unpaid at the date of the husband's death were not separate property of the wife.

APPEAL by the defendant against the judgment of Day, J., at the trial of the action without a jury.

The defendant was a widow. The action was brought to recover the balance of principal and interest due to the plaintiff by the defendant by virtue of a covenant contained in an indenture of charge, dated January 20, 1883, and made between the defendant and her late husband, Philip Lee, of the one part, and the plaintiff of the other part.

The defendant was formerly the wife of Charles L. Thorpe, who died in 1877. On November 20, 1875, a deed of separation was executed by Mr. and Mrs. Thorpe and two trustees, by which,

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after recitals that differences had arisen between the husband and wife, that they had agreed to live separate, and that the husband had agreed to allow the wife an annuity of 500*l.*, "as and for her separate maintenance and support during the joint lives" of himself and the wife, but determinable as thereinafter mentioned, the husband covenanted with the trustees (inter alia) that it should be lawful for the wife to live separate from him, and that he would, during the joint lives of himself and the wife, pay to the trustees the annuity of 500*l.*, by equal quarterly payments, and that the trustees should stand possessed of the annuity during the continuance thereof, upon trust, until the husband should have been made liable for and should have been compelled to pay some debt or debts contracted by the wife after the execution of the deed, to pay the annuity to the wife "for her separate use, without power of anticipation"; but, in case the husband should have been made liable for and should have been compelled to pay some debt or debts contracted by the wife after the execution of the deed, after notice of the proceedings to enforce the payment of such debt or debts, and a failure on the part of Soares, one of the trustees, to indemnify the husband against the same, then and upon trust out of the annuity then due, or from time to time to grow due, to pay the amount of such debt or debts and the costs incurred by the husband in respect thereof, and to pay the surplus (if any) of such current and growing and future payments of the annuity to the wife, for her separate use, without power of anticipation. Provided that, in case the husband should at any time thereafter obtain a decree or judgment absolute for a divorce against the wife in respect of any circumstances accruing after the date of the deed, or in case the wife should at any time thereafter be proved to be leading a notoriously unchaste life, then and in either of such cases and thenceforth the annuity should absolutely cease and determine. There followed a covenant by Soares to indemnify the husband against the wife's debts incurred since the date of the deed, the husband duly performing his covenants.

Charles L. Thorpe, by his will, devised and bequeathed all his real and personal estate unto and to the use of Jane Vipont and Walter Butler (whom he also appointed executrix and executor

of his will) upon trust (inter alia) to invest 500*l.* in their names in Consols, and to pay the dividends to his Aunt Brown during her life; and also to invest 12,000*l.*, and to pay the interest arising therefrom to the said Jane Vipont during her life; and to invest the further sum of 5000*l.*, as therein mentioned, and to pay the income arising therefrom to Ann Radcliffe during her life; and to invest the further sum of 5000*l.*, and to pay the income arising therefrom to his wife, Charlotte A. R. Thorpe, during her life. And the testator declared "that neither of them, my said Aunt Brown, the said Jane Vipont, Ann Radcliffe, and Charlotte A. R. Thorpe, shall have power to alienate, charge, or anticipate the income of the several legacies bequeathed for their benefit as aforesaid." At the time of Thorpe's death a considerable sum was due from him in respect of the annuity of 500*l.* under the separation deed. In 1878 an action was brought in the Chancery Division for the administration of Thorpe's estate. On April 26, 1880, Mrs. Thorpe married Lee. On January 20, 1883, an agreement was executed, which was expressed to be made between Lee and his wife, of the one part, and Stogdon, of the other part, and thereby Lee and his wife admitted that upon account stated Mrs. Lee was indebted to Stogdon in the sum of 1320*l.* 18*s.* 6*d.*, for moneys advanced by him to or on account of her, and interest thereon from February 5, 1881. And, in consideration thereof, and of Stogdon forbearing to enforce immediate payment, Lee, and Mrs. Lee, to the intent to charge and bind her separate estate, did thereby jointly and severally covenant with Stogdon to pay the sum of 1320*l.* 18*s.* 6*d.* on February 8, 1883, together with interest thereon at the rate of 5 per cent. from February 5, 1881. And Lee and his wife, according to their several and respective interests therein, did thereby subject and charge to and in favour of Stogdon all and singular the properties mentioned in the schedule thereto as a security for the payment of the sum of 1320*l.* 18*s.* 6*d.*, and interest. The schedule to this agreement comprised (1.) the income and arrears thereof owing from the sum of 5000*l.* to which Mrs. Lee, or her husband in her right, was entitled under the will of Thorpe; (2.) a sum of 930*l.* 12*s.* 6*d.*, and interest, which Mrs. Lee, or her husband in her right, claimed to be entitled to receive out of the estate of

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Thorpe, or other the sum of money which might be found by the Court in the administration action to be due to Mrs. Lee, or her husband in her right, under or by virtue of the separation deed of November 20, 1875. This agreement was executed by Mrs. Lee, but not by her husband. On April 26, 1883, another agreement was executed by Mr. and Mrs. Lee, by which they confirmed the agreement of January 20, 1883.

On August 14, 1883, an order was made in the administration action, that a sum of 871*l.* 8*s.* 9*d.* (being the arrears of the annuity under the separation deed), should be paid out of certain funds in Court in the action to Stogdon, as mortgagee of Mrs. Lee, and on August 30, 1883, this sum was paid out to him.

In October, 1886, Lee died.

The present action was brought in March, 1889, to recover the balance of the 1320*l.* 18*s.* 6*d.*, and interest, after deducting the 871*l.* 8*s.* 9*d.*

Cozens-Hardy, Q.C., and *Aspland, Q.C.*, for the defendant. At the time when the defendant executed the charges in favour of the plaintiff she had either no separate estate at all, or none with reference to which she could be reasonably supposed to be contracting. In order that under s. 1 of the Married Women's Property Act, 1882, the separate property of a married woman should be bound by her contract, she must have some separate property existing at the date of the contract, and, if she has, her after-acquired separate property will be bound: *In re Shakespear* (1); *Palliser* v. *Gurney* (2). Moreover, there must be separate property existing of such a nature that it can be reasonably supposed that she intended to contract with respect to it: *Leak* v. *Driffield*. (3) In the present case the action is brought upon a covenant contained in the deed of charge. Even if the property which the mortgagee acquired by virtue of the charge was separate property, still it cannot be reasonably supposed that the defendant entered into the covenant with reference to that property which the mortgagee had acquired in another way. The result is the same

(1) 30 Ch. D. 169. (2) 19 Q. B. D. 519.
(3) 24 Q. B. D. 98.

as if the arrears of the annuity had been by a separate deed mortgaged for their full amount to a third party; the equity of redemption would then have been worthless.

But it is further contended that, upon the true construction of the separation deed, the separate use thereby created was only to last during the joint lives of the husband and wife, and therefore the arrears of the annuity which remained due after the death of the first husband were not separate property of the wife. The separate use was only created as against the first husband; it applied only to the period of the first coverture. In an ordinary case no doubt a separate use will apply to any coverture of the wife; but a separation deed contemplates only the continuance of the particular coverture. The object is to prevent the annuity which the husband thereby covenants to pay from getting back into his own pocket. Whichever construction is right, the plaintiff's title to the arrears is unaffected, because the defendant's second husband joined in the assignment.

As to the income of the 5000*l.* which is given to the defendant by the will of her first husband, there are no words giving it to her for her separate use. The restraint on anticipation cannot of itself create a separate use. Such a restraint is only valid when it is added to an interest given to a woman for her separate use. Standing alone, the attempted restraint on anticipation is as ineffectual as it would be in the case of a man: *Baggett* v. *Meux* (1); *Moore* v. *Morris*. (2)

Channell, Q.C., and *Herbert Reed*, for the plaintiff. As to the will, no doubt a restraint on anticipation is valid only as an accessory to an estate given to a woman for her separate use. But to create a separate use it is only necessary that there should be an intention to do so, and the Court will infer such an intention when it finds a clause restraining anticipation. The Court will not hold that the clause is entirely inoperative, when there is a way in which it can be made operative. In *Baggett* v. *Meux* (1), there is nothing more than a dictum to the contrary. As to the annuity under the separation deed, according to *Tullett* v. *Armstrong* (3), when property is given to a woman for her

(1) 1 Coll. 138. (2) 4 Drew. 33.

(3) 1 Beav. 1; 4 M. & C. 377.

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separate use, the separate use applies to every coverture. If she ceases to be under coverture, the separate use ceases to have any effect; but, if she marries again and she has not meanwhile disposed of the property, the separate use revives. Consequently, the arrears of the annuity, which had not been paid to the defendant at the time when she married her second husband, were her separate property as against him.

Indeed, in a separation deed, it is not even necessary to use the words "separate use."

LORD ESHER, M.R. I think the objections which have been taken to the judgment are too strong to be got over, and we must disagree with the learned judge in the Court below.

The whole matter depends upon what is the true construction of the separation deed and the will. If the construction of them both is such that the defendant had no separate estate at the time when the charges in favour of the plaintiff were created, the plaintiff's case necessarily fails, by reason of the decision in *Palliser* v. *Gurney*. (1) That case will now have the authority of the Court of Appeal, as well as that of a Divisional Court consisting of three judges of the Court of Appeal.

With regard, then, to the construction of the separation deed, I think it is admitted that if the deed had said in express terms, "the annuity which I give to my wife for our joint lives is to be for her separate use as against me only," there would be no separate use as against any other husband whom the wife might have after the death of the first. But I think that, upon any reasonable construction of the deed as a whole, one must be led to the conclusion that the husband was speaking only of a separate use in his wife as against himself. He could not have been thinking of a husband to whom she might be married after he was dead, because the annuity was to cease with the joint lives—that is, the moment he died, if he died first. He could not, therefore, have intended to give the annuity to the separate use of his wife, as against a husband whom she might marry after his death. With regard to any husband whom she might marry in case of a divorce obtained by himself, the deed

(1) 19 Q. B. D. 519.

provides that, if the cause for the divorce should arise after the date of the deed, the annuity is thenceforth to cease, and, therefore, he could not have thought of that any more than of a husband whom she might marry after he was dead. There was, of course, the possibility of his finding out after the execution of the deed that he had a cause for obtaining a divorce from his wife which existed before the date of the deed. But can any one who takes a reasonable view of human nature suppose that, when he made this deed and settled an annuity of 500*l.* a year on his wife, he was contemplating the possibility of her having previously given him a good ground for obtaining a divorce, and intending that, in case he should obtain a divorce on that ground, the annuity should be to her separate use as against any husband whom she might then marry before his own death? The very notion is absurd. Can it then be supposed that he was contemplating the possibility of his wife's obtaining a divorce from him? It is conceivable that he might afterwards give her a good cause for obtaining a divorce—that is in human nature; but that he should sit quietly down and contemplate the possibility of his doing so is not conceivable, because the only cause which he could give her would be adultery coupled with cruelty, and, therefore, he would be contemplating something very wrong on his own part. The question of desertion could not arise, because the husband and wife were agreeing to live separately. I think, therefore, it is clear that the separate use mentioned in the deed is a separate use of the income as against the first husband alone, and that arrears of the annuity which ought to have been paid before, and which, if they had been paid before, would not have been separate estate, except as against him, were not after his death separate estate at all.

Then we come to the will of the husband. The will gives the wife the income of a sum of 5000*l.* during her life, without any words of separate use; but there is a subsequent declaration that she is not to have "power to alienate, charge, or anticipate the income." Are those words by themselves, there being no other words, sufficient to give her a separate estate as against her husband; are those words enough to authorize

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the Court to draw the inference that the income was intended to be the wife's separate property? On this point there is, in *Baggett* v. *Meux* (1), a dictum of Knight Bruce, V.-C., a very powerful judge and a master of this branch of the law, which although it was not necessary for the decision of that particular case, was part of his considered judgment. He says in the most deliberate and explicit terms that words (equivalent to those of the present will) prohibiting alienation of property by a married woman would be of no effect, unless there were also other words giving the property to her for her separate use. And Lord Langdale, another powerful judge, in *Tullett* v. *Armstrong* (2) used language which shews that he took precisely the same view as Knight Bruce, V.-C. Two such authorities as these are, I think, sufficient to determine the present case on authority alone. But, on principle, the construction insisted upon on behalf of the plaintiff would lead to this—that that which is a mere accessory to the separate use for the purpose of rendering it effectual, ought, standing alone, to compel an implication of that separate use to which it is only an accessory. I think that the two cases to which I have referred govern the construction of this will, and that no separate estate was given to the wife by it.

There is, therefore, no separate property given to the defendant, by either deed or will, as against her second husband. The arrears of the annuity are not separate property which she acquired in the interval between the death of her first husband and her second marriage. It follows that we cannot agree with the decision of the learned judge, and we must allow the appeal and enter judgment for the defendant.

BOWEN, L.J. I am of the same opinion. As regards the restraint on alienation created by the will, nothing is plainer than that such a restraint may be effectual as an accessory to a separate use already existing. If, however, the restraint is imposed in any other way it is inoperative. I think I need say no more on this point. If anything more is required it will be said by Fry, L.J., who is far more conversant with the subject than I am.

(1) 1 Coll. 138. (2) 1 Beav. 1.

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Then, as regards the separation deed, the argument for the defendant comes to this, that the deed shews that the separate use was not intended to continue beyond the existence of the marital relation between the parties. I would rather put it thus, that the deed was intended to create a separate use only during the joint lives of the parties, for I desire to leave open the possibility, that, in the probably undreamt of contingency of a divorce, to which the Master of the Rolls has alluded, the separate use would have arisen as against a second husband taken by the wife during the joint lives of herself and her first husband. Whether that view, which is only my own idea, or the other view, which is taken by the Master of the Rolls, is the more correct one, is not really material, because the separate use was certainly to come to an end at the death of either party. After that there is nothing to fetter the produce of the annuity.

FRY, L.J. I am of the same opinion. With regard to the separation deed, it appears to me difficult to conceive that there could be an intention that the produce of the annuity should be held to the separate use of the wife at a time when the annuity itself had ceased. The annuity was to cease on the death of either husband or wife. It is difficult to imagine that a separate use could be created after the death of the husband. But I think the meaning is reasonably plain as expressed in the instrument itself. In the first place, there is a recital that the husband had agreed to allow the wife an annuity of 500*l.* "as and for her separate maintenance and support during the joint lives of himself and his wife, but determinable as hereinafter mentioned." Then comes his covenant that he will, during the joint lives of himself and his wife, pay to the trustees the yearly sum of 500*l.* Then follows the most material part of the deed, the declaration of trust: "It is agreed and declared that the trustees, and the survivor of them, shall stand possessed of the annuity during the continuance thereof, upon trust to pay the same to the wife, for her separate use without power of anticipation." Therefore, by the very express terms of the instrument itself, the trust for the separate use is declared only during the continuance of the annuity. In other words, the deed declares

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that the separate use is to be until the death of whichever shall first die of the husband or wife, and we are only giving effect to the instrument itself in holding that, whether the separate use applies to any other coverture than that which was then existing, it does not apply to any coverture which may exist after the termination of the joint lives.

Now with regard to the will the case stands thus. There is a gift of income to four ladies (one of them being the testator's wife), for their respective lives, and there is a declaration that neither of them "shall have power to alienate, charge, or anticipate the income of the several legacies bequeathed for their benefit as aforesaid." It is admitted that that, as it stands, is an attempt to restrain anticipation by the ladies during their lives, whether they are married or unmarried; but we are asked to cut it down to a restraint on anticipation during coverture only, and thence to infer a gift to their separate use. Now, it is to be observed that a restraint on anticipation can never exist except as an accessory to a trust for a separate use, and we are asked to infer the existence of the substance from the existence of the accessory. In my opinion, that cannot be done. It must be borne in mind that the Courts have always leaned against a restraint on alienation, and for this very obvious reason, that to give property to a person involves giving him a power to alienate it, and an instrument which, while giving property, takes away that incident to it must always be construed strictly. I believe that in no case has a trust for a separate use been inferred from a restraint on alienation. Attention has already been drawn to *Baggett* v. *Meux* (1), in which Knight Bruce, V.C., expressed a clear and decisive opinion that this could not be done; and I may quote also the language used by Lord Langdale in *Tullett* v. *Armstrong* (2), where he says: "I conceive that the validity of a clause in restraint of alienation, when clearly expressed, in connection with a clause giving the estate for the separate use of a married woman, also clearly expressed, has not till lately been doubted." That, I think, is the furthest extent to which the doctrine has been carried, and therefore the argument in the present case has gone too far. It is impossible for

(1) 1 Coll. 138. (2) 1 Beav. 23.

us from the general restraint on alienation or anticipation to infer a trust for the separate use of the wife. Consequently, the defendant had no property for her separate use at the time when she executed the two charges in favour of the plaintiff; and, therefore, on the authority of *Palliser* v. *Gurney* (1), the plaintiff's case fails, and we must give judgment for the defendant, with the costs of the action.

Appeal allowed.

Solicitors: *Agate & Garnett; J. C. Stogdon.*

W. L. C.

[IN THE COURT OF APPEAL.]

March 19.

THE QUEEN *v.* JACKSON.

Husband and Wife—Authority of Husband—Refusal of Wife to live with Husband—Restitution of Conjugal Rights—Absence of Power to deprive Wife of Liberty.

Where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights.

ARGUMENT on the return to a writ of habeas corpus, commanding Edmund Haughton Jackson to bring up the body of Emily Emma Maude Jackson, his wife, taken and detained in his custody. (2)

(1) 19 Q. B. D. 519.

(2) Application for a writ of habeas corpus had in the first instance been made to and refused by the Queen's Bench Division (Cave and Jeune, JJ.). An application was then made to the Court of Appeal, alternatively, by way of original motion for the writ, and also by way of appeal against the refusal of it by the Queen's Bench Division. A discussion arose on such application as to whether the Court of Appeal had jurisdiction to entertain it, either original or by way of appeal. It was pointed out during the discussion that the Lord Chancellor, then sitting in the Court of Appeal, had jurisdiction as Chancellor to issue the writ. Ultimately, the writ was ordered by the Court of Appeal to issue, subject to the question as to their jurisdiction. Upon the return, the counsel for the husband declined to argue the question of jurisdiction, on the ground that it was not open to them in the Court of Appeal, having regard to the observations in the judgment in that Court in the case of *Ex parte Bell Cox* (20 Q. B. D. 1), on the question whether there is an appeal when the habeas corpus is refused, which was left open by the House of Lords in *Cox* v. *Hakes* (15 App. Cas. 506). There was, therefore, no argument on the subject of the Court's jurisdiction.

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The return made to the writ by the said E. H. Jackson was as follows. He stated that the said Emily Emma Maude Jackson was his wife; that, during his absence in New Zealand in the year 1888, she went to reside with her sisters and brother-in-law; that it was arranged that she should shortly join him in New Zealand; but she wrote pressing him to return to England, and he did so, but she then refused to live with him, and he was denied access to her; that he commenced proceedings in the Probate, Divorce, and Admiralty Division of the High Court of Justice against her for restitution of conjugal rights, and a decree was made for such restitution; that, since the making of such decree, he had endeavoured to persuade his wife by letters (personal access being still denied him) to come and live with him; but, acting under the advice and counsel of her sisters and brother-in-law, she had in no way responded to his overtures; that he, therefore, took his said wife, and had since detained her in his house, using no more force or constraint than was necessary to take her or to prevent her returning to her said relations; that she had had perfect liberty in and the full run of the house, short of leaving it; and he submitted that he could lawfully use such restraint in order to have an opportunity of regaining the affection of his wife, which had become alienated from him, and which it was impossible he could do when she was under the influence of her said relations.

Affidavits were filed on both sides, the substance of which, so far as material to this report, was as follows. It appeared from the husband's affidavit that the marriage took place on November 5, 1887; that he executed a settlement of his wife's property on November 9; that on the next day he started for New Zealand, it being arranged between him and his wife that she should join him there in about six months, as soon as he got settled; that, after his arrival there, he received letters from her urging him to return, and that he accordingly did so; but she refused then to live with him; whereupon he sued for and obtained a decree for restitution of conjugal rights. (1) His wife refusing to obey such decree, on Sunday,

(1) It should be observed that it appeared, as pointed out by the Lord Chancellor, that the wife had had no opportunity of making any affidavit.

March 8, 1891, the husband, assisted by two young men, one of whom it appeared was a solicitor's articled clerk, seized her, just as she was leaving a church in Clitheroe in company with her sister, and forced her into a carriage, which was in readiness. The affidavits of the husband, and those who assisted him, stated that, in obtaining possession of his wife, no violence was used, and no more force than was absolutely necessary to separate her from her sister, to whom she was clinging, and get her into the carriage. In the affidavit of the wife's sister, it was stated that the wife was seized in full view of the congregation coming out of church, and that she resisted seizure, and was dragged backwards into the carriage, her feet remaining outside until they were lifted into the carriage by the solicitor's clerk. Her arm was bruised in the struggle. The carriage was then driven off, the solicitor's clerk, with whom the wife was stated to have been previously acquainted, accompanying the husband and wife in it. The carriage proceeded to the husband's house in Blackburn, which the party entered, and in which the wife had been detained until she was brought up in obedience to the writ of habeas corpus. The husband placed his wife in charge of his sister, with instructions to give her every attention, and he also engaged a nurse to attend on her in the house. During her detention he caused her to be visited by a doctor. After the seizure of the wife, certain of her relations followed to Blackburn and appeared before the house. It was stated in the husband's affidavit, that under those circumstances his coadjutors in seizing the wife remained with him in the house to assist in preventing any attempt at a forcible rescue. In consequence of warrants being taken out for their arrest on a charge of assault on the wife's sister, and the arrival of the police to execute the same, the house was kept shut up, and no one was admitted for some days; but afterwards, an undertaking to appear before the magistrates having been given by their solicitors, the police were withdrawn, and, all fear of an arrest being at an end, the house was accessible to any one whom the husband cared to admit. It was stated by the affidavit of the husband, and those made on his behalf by the persons in the house during the wife's detention, that every kindness and consideration had been shewn by the husband to

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his wife; that she had had the free run of the house, doing just as she pleased, save leaving the house; and that he had offered several times to take her for a drive, but she had declined to go. It was admitted by the husband that on one occasion the blinds of a room in which she was were pulled down, to prevent her exchanging signals with her relations outside; but they were drawn up a few moments afterwards, and no restraint was subsequently placed upon her so seeing or communicating with her relations. It appeared from an affidavit made on the husband's behalf by the doctor, who attended the wife in the house, that the only complaint whatever made by the wife to him as to the treatment she received was that her husband had, when they entered the house, taken her bonnet off and thrown it in the fire, and that her arm had been hurt. (1)

Henn Collins, Q.C., and *Malcolm P. Douglas*, for the husband. It is contended that, if a wife refuses to live with her husband, he has a right by law to take possession of her person by force, and keep her, not imprisoned, but confined, till she consents to do so, in order to prevent her from permanently withdrawing her society from him. *In re Cochrane* (2) is an authority for that proposition. In that case the release of the wife was refused in a case similar to the present. Coleridge, J., in giving judgment in that case, said: "There can be no doubt of the general dominion which the law of England attributes to the husband over the wife; in Bac. Abr. tit. Baron and Feme, B., it is stated thus: 'The husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner.' And although by our ancient law she was entitled, in case of threats of violence, or violence offered, to sue out her writ of supplicavit, yet that writ, in such case, had a special saving of the husband's lawful power; he was to be bound 'Quod ipse

(1) Various statements were contained in the affidavit of the husband seeking to shew that his wife's refusal to live with him was due to the influence of her relations; but inasmuch as the Court, on seeing Mrs. Jackson, came to the conclusion that she was not acting otherwise than as a free agent, it is not thought necessary to set them out for the purposes of this report.

(2) 8 Dowl. 630.

præfatam A' (the wife) 'bene et honeste tractabit et gubernabit, ac damnum aut malum aliquod eidem de corpore suo, aliter quam ad virum suum, ex causâ regiminis, et castigationis uxoris suæ licite et rationabiliter pertinet, non faciet, nec fieri procurabit.' Fitz. Nat. Brev. 80." See also *Seymour's Case.* (1) It is not contended that the law entitles a husband to beat his wife, as stated in Bacon's Abridgment and some of the earlier authorities; but the authorities generally shew that he is entitled to the custody and control of his wife, and to detain her by force if she refuses to live with him: see *Atwood* v. *Atwood.* (2)

[LORD HALSBURY, L.C. Where ancient dicta, which state that a husband is entitled to imprison his wife, also state that he has a right to beat her, can they be rejected as authorities for the latter proposition without being affected as authorities for the former?]

Hale, C.J., says, in *Lord Leigh's Case* (3), that the "salvâ moderatâ castigatione" of the Register was meant not of beating, but of admonition and confinement to the house in case of the wife's extravagance. In *Manby* v. *Scott* (4) it is stated that the law makes the wife subject to her husband, although the husband may not put her to death, for that would be murder; neither can he beat her. A husband cannot be guilty of a rape upon his wife. (1 Hale, P. C. 629) In Bacon's Abridgment, 7th ed. vol. i. p. 693, tit. Baron and Feme, B., a distinction is drawn between confinement and imprisonment, and it is said that the husband hath by law a right to the custody of the wife, and may, if he think fit, confine, but may not imprison her. It would appear from the context that the word "imprisonment," as there used, means imprisonment by way of punishment, involving circumstances amounting to "sævitia." In this case the wife was not imprisoned in that sense; she was not shut up in a single room, which might be imprisonment, but had the free run of the house, and might have gone out, if she had wished, in charge of the husband. In *Rex* v. *Lister* (5), it was no doubt said that, where

(1) Godbolt, 215.
(2) Finch's Chancery Precedents, 492.
(3) 3 Keb. 433.
(4) 1 Sid. 109; 1 Lev. 4; 2 Sm. L. C. 466, 479.
(5) 1 Str. 478.

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the wife will make an undue use of her liberty, either by squandering away the husband's estate or going into lewd company, it is lawful for the husband, in order to preserve his honour and estate, to lay such a wife under a restraint, but, where nothing of that appears, he cannot justify depriving her of her liberty; but, with regard to the latter part of this statement, it is to be observed that, in that case, there had been a separation by consent, and consequently a renunciation of the marital right, and the Court expressly rely on that ground.

[LORD HALSBURY, L.C. The judgment does not seem to me to be based on that ground, but on the idea that the only right to restrain the wife was when she was squandering the husband's estate or frequenting lewd company.]

In that case the facts shewed that the husband was abusing his power in order to make his wife part with some of her separate maintenance, and it has been held that the Court will not force a wife to live with the husband where he has been guilty of violence or ill-usage. In *Rex* v. *Mead* (1), the Court based their refusal to deliver the wife into the custody of the husband on the fact that there had been articles of separation, and therefore the husband had renounced his marital right.

[LORD HALSBURY, L.C. The proposition, apparently, must go the length of saying that any amount of force which may be necessary in order to take possession of the wife's person may be employed.

LORD ESHER, M.R. And also that, if the wife continues to refuse to live with the husband, the confinement may be perpetual.]

Reg. v. *Leggatt* (2) does not overrule *In re Cochrane*. (3) All that was really there decided was that a habeas corpus could not be granted at the suit of the husband where the wife was under no restraint, and living apart from the husband by her own desire. The Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), does not affect the question. It took away the power of enforcing a decree for restitution of conjugal rights by attachment; but that cannot affect the common law right of the husband to the custody of his wife. The attachment in such case was punitive

(1) 1 Burr. 542. (2) 18 Q. B. 781. (3) 8 Dowl. 630.

in respect of a contempt committed by disobedience of the decree of the Court. All the Act does is to abolish that punitive process.

Finlay, Q.C., and *Forbes Lankester*, for the wife. The wife is entitled to be set at liberty. A husband has no power by the law of England to imprison his wife if she refuses to live with him. Every confinement is an imprisonment by law, whether it be to one room or to one house. The contention for the husband would result in the reintroduction into society of private war; for the male relations of a wife would naturally, if at hand, be likely to resist her capture by the husband. The contention for the husband involves wholly untenable propositions. First, it involves that the husband may take possession of the wife's person by force, though no process of law could give him such possession of her. There never was any process of law for seizing and handing over the wife to the husband; the Ecclesiastical Courts only imprisoned by way of punishment for contempt in disobeying the decree for restitution of conjugal rights. If the law was as contended for, what need would there ever have been for the husband to apply to the Ecclesiastical Court for restitution of conjugal rights? Again, there are numerous authorities to shew that, if a woman were living separate from her husband, and she apprehended that he would seize her person by violence, she could swear the peace against him. But the contention is that, if he has already seized her, he may detain her by force. If he may use any violence necessary to control and keep possession of her, it follows that he may beat her for that purpose if necessary. The two things necessarily go together, and are constantly associated in the ancient dicta that have been cited. In dealing with such authorities, it is impossible to throw overboard the right to beat and retain the rest of the proposition with regard to the right to imprison. The result of the contention is, that the husband must have a right to imprison the wife until she consents to restore him conjugal rights, and even to imprison her perpetually if she persists in refusing to do so. Such a result is monstrous, and shews that the contention cannot be correct in law. *In re Cochrane* (1) is really overruled by *Reg.* v.

(1) 8 Dowl. 630.

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Leggatt. (1) Lord Campbell, in giving judgment in that case, said: "If a writ of habeas corpus were to issue, and the wife were to be brought before us, we could not compel her to return to her husband; she would be at liberty to go where she chose. If she has no good cause for remaining away from her husband, he may obtain a decree of the Ecclesiastical Court ordering her to return to him. This case is quite different from that of an infant. There the parent has a right to the custody of the child; and, if it be of tender years, the Court will make an order for its restoration to him. But a husband has no such right at common law to the custody of his wife." It is inconceivable that the husband should be entitled to do by force for himself that which the law cannot enforce in his favour. *Rex* v. *Middleton* (2) and *Rex* v. *Lister* (3) are authorities against such a proposition. In the latter case, the right of the husband to restrain the wife is clearly limited to cases where she is guilty, or about to be guilty, of misconduct touching the husband's estate or honour. It would be a monstrous result that, although the legislature has taken away the power of attachment for disobeying a decree for restitution of conjugal rights, a husband should have the power of seizing and imprisoning a wife who refuses to live with him for himself, without the intervention of any Court.

[They also cited *Lord Vane's Case.* (4)]

LORD HALSBURY, L.C. The Court has satisfied itself that, in refusing to go to and continue in her husband's house, Mrs. Jackson was acting of her own free will, and that she is not compelled or indeed, so far as present circumstances are concerned, induced by any one to refuse to continue in his house, and was not compelled to remain where she was before he removed her. I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery

(1) 18 Q. B. 781.
(2) 1 Chit. 654.
(3) 1 Str. 478.
(4) 13 East, 171, n. At the close of the arguments the Court saw Mrs. Jackson in camerâ in order to ascertain whether, in refusing to live with her husband, she was acting as a free agent, and had not been compelled or induced by any external influences.

existed in England; but, if any one were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country. It is important to bear this in mind, for many of the statements, which have been relied upon, of a more moderate character and less outrageous to common feelings of humanity, are bound up with these ancient dicta to which I refer. The only justification, as it appears to me, for such expressions as are found in some of the old books is that afforded by the free translation given to them by Hale, C.J., who suggests that "castigatio" may be taken to mean admonition merely. Whether the word will bear that translation in these passages I cannot say; but I am glad that some one even at that early period thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist. I only mention the subject, because it appears to me that the authorities cited for the husband were all tainted with this sort of notion of the absolute dominion of the husband over the wife. The only case referred to in which it was decided, as a question of law in an abstract form, unaccompanied by circumstances which might import a qualification, that a husband had a right to the custody of his wife, was *Cochrane's Case.* (1) With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances of misconduct or any acts amounting to a proximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition. I do not mean to lay it down as the law that there may not be some acts, acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom—for instance, if the wife were on the staircase about to join some person with whom she intended to elope, I could understand that there might be to some extent a right to

(1) 8 Dowl. 630.

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restrain the wife. It is not necessary, however, on the present occasion to discuss that question any further than to say that I can understand that some authority on the part of the husband of such a nature and so limited might well be justified according to any system of reasonable law. We have to determine this case on the return to the writ, which states in substance that, because the wife refused to live with the husband, he took her and has since detained her in his house, using no more force or constraint than was necessary to take her or to prevent her from returning to her relations. Such is the return by which he justifies the admitted imprisonment of this lady. I do not know that I can express in sufficiently precise language the distinction which has been suggested between "imprisonment" and "confinement." If there be any such distinction, I should find that in this case there was imprisonment. I do not find any denial in the return that the lady is kept in imprisonment in the husband's house. The return seems to me to be based on the broad proposition that it is the right of the husband, where his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition. The legislature has deprived the Matrimonial Causes Court of the power to imprison for refusal to obey a decree for the restitution of conjugal rights. The husband's contention is that, whereas the Court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree for restitution of conjugal rights, and even that power has been now taken away, the husband may himself of his own motion, if she withdraws from the conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. I am of opinion that no such right exists or ever did exist. Moreover, assuming that sufficient authority existed for such a proposition, it is subject in any case to the qualification which I observe is always imported, that, where the wife has a complaint of or reason to apprehend ill-usage of any sort, the Court will never interfere to compel her to return to her husband. This brings me to the particular

circumstances of this transaction. I am prepared to base my judgment on the ground that the husband has no such authority as he claims; that no English subject has such a right of his own motion to imprison another English subject, whether his wife or any one else—of course, I am speaking of persons of full age and sui juris; but, assuming that there were such authority, it would be subject to the qualification I have mentioned in the case of apprehended ill-usage, and I am of opinion that the facts of this case afford ample ground for refusing to allow the husband to retain the custody of his wife. It seems to have been thought that the question how far a lady may be dealt with in this way depends on the exact amount of force or violence used or pain inflicted. But is it nothing that a lady coming out of church on a Sunday afternoon is to be seized by a number of men and forcibly put into a carriage and carried off? Must not the element of insult involved in such a transaction be considered? Then, if the lady's statement to the medical man be true, the moment she got into the house the husband took off her bonnet and threw it into the fire. The affidavit of the medical man states that the wife told him so: that affidavit is one of the husband's affidavits, and there is no denial that this happened by the husband. I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect. With regard to the statements as to the earlier part of the history of the case, contained in the husband's affidavits, I am unwilling to look at them for this reason: I do not deny that unqualified and uncontradicted they do make out a case in his favour, so far as shewing that this alliance was entered into under circumstances which do not reflect any discredit on him. But I am unwilling to discuss those statements of the affidavits, because I do not know how far they can be trusted, inasmuch as the wife has not been permitted to have any opportunity of communicating with any legal adviser as to any matters on which she might have contradicted those affidavits. Therefore, it seems to me that, though one has no right to say that one disbelieves those statements, it is impossible to rely upon them under the

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circumstances. The result is, in my opinion, that there is no power by law such as the husband claims to exercise, and, if there were, the facts give ample ground to the lady to apprehend violence in the future. Either of these grounds is sufficient to shew that the return to this writ is bad, and that this lady must be restored to her liberty.

LORD ESHER, M.R. In this case it is really admitted that this lady is confined by the husband physically so as to take away her liberty. The only question for us to determine is whether in this case we can allow that to continue. The husband declares his intention to continue it. He justifies such detention; and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement, in order to prevent her from absenting herself from him so as to deprive him of her society. A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. *Cochrane's Case* (1) was cited as deciding that the husband has a right to the custody, such custody, of his wife. I have read it carefully, and I think

(1) 8 Dowl. 630.

that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if a wife were about immediately to do something which would be to the dishonour of her husband, as if the husband saw his wife in the act of going to meet a paramour, I think that he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offence, he may imprison her, and it must go the full length that he may perpetually imprison her. I do not think that this is the law of England. But, assuming that there is such a right, the question arises whether the way in which and the circumstances under which it has been exercised in this case are such that the law ought to give back to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out of church, in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage, and falls on the floor of the carriage with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her. That in itself is insulting. She goes to a window in the house, and, one

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of her relations being outside, the blind is immediately pulled down. I think that the circumstances of this seizure and detention were those of extreme insult, and I cannot think that it can be that under such circumstances as these the husband has a right to keep his wife insultingly imprisoned till she undertakes to consort with him. In my opinion, the circumstances are such that the Court ought not to give her back into his custody. He has obtained, it is true, a decree for restitution of conjugal rights; but that gives him no power to take the law into his own hands and himself enforce the decree of the Court by imprisonment. Formerly that decree might have been enforced by attachment for contempt; but that would have been an imprisonment by the Court, not by the husband. The power of attachment in such cases is now taken away. The suggestion, therefore, must be that, though the Court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the Court. I think that the passing of the Act of Parliament which took away the power of attachment in such cases is the strongest possible evidence to shew that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to shew that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for in this case. If there is now a greater difficulty than there was in enforcing, or if it is now impossible effectively to enforce a decree for the restitution of conjugal rights, the legislature has caused this by Act of Parliament, and the legislature must deal with the matter. For these reasons I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back the custody of this lady to him.

FRY, L.J. The return to the writ raises the legal question whether a husband has, by the law of England, where his wife refuses to live with him, a right to capture and confine her until she renders to him conjugal rights. The affirmative of the proposition was contended for by the counsel for the husband.

The proposition divides itself into two parts, one having regard to the right to capture, the other to the right to confine. With

regard to the alleged right to capture, there does not appear to me to be a rag of authority in favour of such a right. No authority, even of the oldest times, was cited in support of such a right. *Cochrane's Case* (1) did not relate to the right of capture, but to the right of the husband to confine or imprison the wife until she rendered conjugal rights. That case occurred in 1840, and no earlier authority was cited in it for the proposition that the husband had such a right except the passage in Bacon's Abridgment, which affirms that "the husband has power and dominion over the wife, and may keep her by force within the bounds of duty." That proposition is so vague that it cannot be considered satisfactory authority, and it is directly at variance with the decision in *Rex* v. *Lister* (2), where it is said that the husband may restrain the wife on certain grounds, such as that she was spending his estate and consorting with lewd company, and that those are the only grounds on which he may restrain the wife. I cannot, under these circumstances, consider that *Cochrane's Case* (1) is a satisfactory authority. I cannot overlook this consideration: similar cases must have occurred over and over again; but the habitual course of practice has been to have recourse to the Ecclesiastical Court, and to obtain a decree for restitution of conjugal rights; and no case is to be found by which it is established that such a right as that contended for by the husband in this case is given by the law of England. This appears to me to be cogent evidence to shew that the law is not as contended for.

After *Cochrane's Case* (1) came *Reg.* v. *Leggatt* (3) which, to say the least, weakens the authority of *Cochrane's Case* (1). It is there said by Lord Campbell, C.J., that the husband has no such custody of the wife as a parent has of a child. Therefore, if the matter rested there, I should say it was clear that by law there was no such right in the husband as contended for; but assume that the matter were doubtful at the time of the passing of the Act of 1884 with regard to the practice of the Matrimonial Causes Court, I say that it is doubtful no longer. That Act deprived the Court of the power to enforce a decree for the restitution of conjugal rights by attachment, and substituted for that power two things: it gave power in the case of both husband

(1) 8 Dowl. 630. (2) 1 Str. 478. (3) 18 Q. B. 781.

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and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment. I cannot think that, after the legislature has taken away the right of the Court to enforce restitution of conjugal rights by attachment, the husband has any right of imprisonment in a case in which he is at once a party, the judge, and the executioner, or that he can enforce such restitution by himself imprisoning the wife without the assistance of the Court.

I confine myself to determining the precise question which is raised by this return, and I prefer not to diverge into the consideration of other questions more or less cognate to this. I do not think it necessary for the present purpose to advert to the older authorities on those questions which have been cited to us, beyond saying that I do not regard them with exactly the same feelings as the Master of the Rolls, nor think that all our predecessors on the judgment seat were deficient in good sense. I also prefer to abstain from expressing an opinion as to the personal conduct of the husband in this transaction, and I do not make any view of his conduct any part of the grounds of my decision. I do not think that it is possible to arrive at a just conclusion on these matters without further knowledge of the circumstances which led up to the transaction. There may or may not have been matters which might more or less furnish excuses for what was done on both sides; but, for the reasons indicated by the Lord Chancellor, it seems to me to be unsafe to rely on any view of matters the history of which is not fully before us. I agree in the result at which the Lord Chancellor and the Master of the Rolls have arrived on the ground that the right set up by the husband does not exist by the law of England.

Return held bad, and wife to go free.

Solicitors for the wife: *Shaw, Tremellen, & Kirkman, for Hall, Baldwin, & Weeks, Clitheroe.*

Solicitors for husband: *F. J. Thairlwall, for Ainsworth, Sanderson, & Howson, Blackburn.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1891
April 15, 16.

DE SOUZA *v.* COBDEN.

County Council—Election as Member—Women, Incapacity of—Lapse of Twelve Months—Disqualification—Penalties for acting when disqualified—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 41, 73—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 2, 75.

By s. 41 of the Municipal Corporations Act, 1882, it is provided that, if any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding 50*l.*, recoverable by action. Sect. 73 of the same Act provides, that every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a quo warranto, shall be deemed to have been to all intents a good and valid election.

The above provisions are incorporated by the Local Government Act, 1888, in reference to county councils.

The defendant, a woman, having been elected a member of a county council, twelve months elapsed without any proceedings taken to question the validity of her election. After the expiration of the twelve months, she acted on several occasions as a member of the council:—

Held, affirming the decision of Day, J., that the defendant was liable to the penalties imposed by s. 41 for acting when disqualified.

Query, whether s. 73 applies to the election of a person whose status is one of absolute incapacity for election, as in the case of a woman.

Appeal from the judgment of Day, J., at the trial without a jury.

The action was by a member of the London County Council to recover five penalties from the defendant under the 41st section of the Municipal Corporations Act, 1882, for having acted and voted on five occasions as a member of the county council when disqualified, contrary to the provisions of the section. The facts were as follows:—

The defendant, a single woman, was elected a member of the London County Council, under the Local Government Act, 1888, and subsequently made the declaration required by the Act. Twelve months had elapsed since her election, and no proceedings had been taken to question its validity. On five occasions

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subsequently to the expiration of the twelve months she acted and voted as a member of the county council.

The learned judge held that the defendant was liable to the penalties, and gave judgment accordingly. (1)

Rigby, Q.C., and *Bigham, Q.C.*, (*Costelloe*, with them), for the defendant. The decision in *Beresford Hope* v. *Lady Sandhurst* (2) shews that a woman is disqualified for election as a member of the county council; but, if she is in fact elected, and twelve months elapse without her election being questioned, by the express terms of s. 73 of the Municipal Corporations Act, 1882, such election is to be deemed to have been to all intents a good and valid election. If the election is to be deemed good she must be entitled to act, and consequently cannot be subject to a penalty under s. 41. She acquires a statutory qualification after the twelve months. Secondly, assuming that s. 73 does not apply, and that a woman is so absolutely disqualified that her election is a nullity, and even after the twelve months it cannot be deemed valid, then it is contended that she cannot be said to act in a corporate office within the meaning of s. 41. If it be impossible that s. 73 should apply to the case of a woman elected, then by parity of reasoning s. 41 cannot apply to a woman. The Act, in that view, must be considered as dealing with male persons only. If the Act cannot, by any possibility,

(1) The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2, provides that "the council of a county and the members thereof shall be constituted and elected, and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act, &c."

And s. 75 incorporates the following portions of the Municipal Corporations Act, 1882, viz., parts 2, 3, 4, &c.

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 41: "If any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding 50*l.*, recoverable by action."

Sect. 73: "Every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a quo warranto, shall be deemed to have been to all intents a good and valid election."

(2) 23 Q. B. D. 79.

confer on a woman a qualification to act as a member of the council, she is not within the scope of s. 41, which must be considered as dealing with persons who might possibly be qualified, but who act without being qualified.

Bosanquet, Q.C., and *S. H. Day*, for the plaintiff. The decision in *Beresford Hope* v. *Lady Sandhurst* (1) shews that a woman is absolutely incapable of being elected and of being a county councillor, so that votes given for her are thrown away. Sect. 73 does not apply to a case where there is a natural incapacity to be a county councillor, such as exists in the case of a woman. Whether s. 73 applies or not, s. 41 is applicable. The offence created by it is acting when disqualified. There is nothing in the subject-matter of the section, or the context, to prevent the application of Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4, by which the masculine gender is to be taken to include females, unless the contrary is expressly provided.

Rigby, Q.C., did not reply.

Lord Coleridge, C.J. The question raised in this case is as to the true effect of s. 73 of the Municipal Corporations Act, 1882, taken in combination with s. 41 of the same Act. With regard to that question I have arrived at the conclusion which I will now proceed to express. I think that, so far as the seat is concerned, the 73rd section prevents any attempt to fill the seat after the expiration of the twelve months. It may be that the person elected practically cannot avail herself of the seat; but the words of the 73rd section, which say that the election shall be deemed to have been, to all intents, a good and valid election, appear to me to be imperative; so that the election of the person elected cannot be questioned, and she must be deemed to have been validly elected. But, nevertheless, I regard it as clear that the person so elected holds the seat subject to the law of the country, and, as part of such law, to the provisions of the 41st section of the Act, and, if the occupant of the seat breaks the law, the legal consequences must follow. The 41st section, in substance, provides that, if a person acts in a corporate office without being qualified, that person shall be liable to a penalty.

(1) 23 Q. B. D. 79.

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I am clearly of opinion that it is impossible, after the decision in *Beresford Hope* v. *Lady Sandhurst* (1), to which I was a party, to say that, without some enabling section, the defendant was entitled to act in an office for which she was not qualified. She has so acted on five occasions, I doubt not bonâ fide, with the intention of raising an important point of law. I think, however, that the view on which she acted was wrong, and that she has subjected herself to the penalties imposed by the 41st section. I am, therefore, of opinion that the appeal must be dismissed.

LORD ESHER, M.R. I agree that the appeal must be dismissed. I take a stronger view in this case than that taken by the other members of the Court; and, as it is stated that the case may go to the House of Lords, I think it as well that I should express that view. The county council is a new institution, which did not exist before the Act of 1888; it is the creation of and depends entirely on that Act. The Act states what persons may be elected, and what persons may elect, members of it, and, in accordance with the modern method of legislation, incorporates in relation to these matters a large portion of the Municipal Corporations Act, 1882, including ss. 41 and 73. What persons does the Act enable to become members of the County Council? It has been decided in the case of *Beresford Hope* v. *Lady Sandhurst* (1) that the Act only enables male persons, being qualified as required, to become members. The grounds of that decision were these: The words used in the enactment with regard to the qualification of councillors are words which primâ facie include men only, but which, by Lord Brougham's Act, will include women, unless the context or the subject-matter shews that it cannot have been intended that they should be included. The whole of the Court thought that the context of the Act contained matter which negatived the supposition that the words were intended to include women, because the Act expressly mentions women when it is intended to include them. Sect. 63 of the Municipal Corporations Act, 1882, expressly provides that, for purposes connected with the

(1) 23 Q. B. D. 79.

right to vote at municipal elections, words in the Act importing the masculine gender shall include women. That was the view of the Court. I went further, and thought that, apart from s. 63, it appeared from the subject-matter that women were not intended to be included. I think so still. The ground I took was that by the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well-recognised custom to the contrary has become established, as in the case of overseers of the poor; and, of course, if women are specially mentioned in an Act of Parliament, they will be qualified. Therefore, in my opinion, whether the context of the words be looked at or the subject-matter, the notion that the Act intends women to be elected or to act as county councillors is negatived. If women are not qualified by the Act, as I have already said, they are clearly not qualified at common law, and therefore they are altogether incapable of being elected. The judgment of the Court in the case to which I have referred went the full length of holding that they were so incapable, and therefore that votes given for a woman were thrown away, and it was as if they had never been given. Applying this doctrine to the language of the 73rd section, I am strongly inclined at present to think that this lady cannot be considered to have been "elected" at all within the meaning of the section, and therefore that the section does not apply. But, supposing that one must read the word "election" in the section as meaning an election de facto, still I think that, having regard to the subject-matter, the section does not apply to the case of a woman any more than the section which provides who may be members of the council. There are no doubt sometimes slips in Acts of Parliament; but it would be, I think, the biggest slip ever known if the legislature has said, although a woman is so absolutely incapable of being elected that votes given for her are to be considered as thrown away and as not having been given, that, nevertheless, if she is de facto elected, and the period of twelvemonths elapses, during which no one is willing to question the election, she is entitled to sit, and, as was contended by the defendant's counsel, to act and vote. I should be reluctant to come to the conclusion that the legislature had

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enacted anything which led to such an absurd result. I am of opinion, therefore, that both the context and the subject-matter shew that the 73rd section does not apply to the case of a woman. I incline to think that, having regard to the words of the Act, that section applies to cases of irregularities in elections which possibly might be good, not to cases of election which by no possibility could be good. Then, with regard to the 41st section, that section in substance imposes a penalty upon a person who acts in a corporate office without being qualified. The words of the section, primâ facie, apply to male persons. The question is, whether there is anything in the context or subject-matter to prevent the application of Lord Brougham's Act and to shew that women could not be included. I think that there is nothing. The section is aimed at any person who breaks the law enacted by the Act in relation to the subject-matter. A woman can do and has in this case done that. If what is aimed at can be done by a woman as well as a man, it seems to me that Lord Brougham's Act is applicable. For these reasons I think that s. 41 is applicable.

FRY, L.J. In this case two questions arise under the Act of 1882. The first question arises under the 73rd section, and it is this: Was there in this case an election within the meaning of that section which could be validated under its provisions; or was the case one in which, though the form of an election might be gone through, there could not possibly be an election? Is the election of a woman, for instance, like the election of a dead man, or that of an inanimate thing which cannot be elected? I am inclined to think that this is not an election which can be made good under the section; that, as the law stands, a woman is absolutely disqualified by nature from being elected to the county council, and that her election is a mere nullity. I do not propose, however, to express a conclusive opinion on this point, because it appears to me that the second point is absolutely conclusive of this case. The second question is whether the 41st section applies. I regard that section and the 73rd section as essentially different enactments, dealing with different subject-matters. The matters that come under the 41st section

are all of them matters arising after the election. The section deals with four contingencies. The first is where a person acts in a corporate office without having made the declaration by this Act required; the second is where a person acts without being qualified at the time of making the declaration; the third is where a person acts after ceasing to be qualified; the fourth is where a person acts after becoming disqualified. All of these cases can only arise after the election. The section does not deal with the validity or invalidity of an election, but with the disqualification of the individual. Therefore, I think that the 73rd section may apply, and the election may be deemed good under that section, and yet the person elected may be subject to penalties in the event of any of the contingencies arising which are mentioned in the 41st section. Assume that the election of the defendant must be deemed valid: yet after that election she has acted without being qualified; she comes within the second contingency referred to by the 41st section, and is therefore liable to the penalties imposed by that section.

Appeal dismissed.

Solicitor for plaintiff: *A. A. Tilleard.*
Solicitors for defendant: *Pyke & Minchin.*

E. L.

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[1891
April 20.

[IN THE COURT OF APPEAL.]

UNWIN, PETITIONER; McMULLEN, RESPONDENT.

Municipal Corporation—Election as Councillor—Qualification—Occupation—Payment of Rates—Joint Occupation of Licensed Premises under Verbal Agreement—"Entitled to be enrolled as a Burgess"—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 1, *sub-s.* 2 (*b*) (*e*), *s.* 11, *sub-s.* 2 (*a*)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 93, *sub-s.* 7, *s.* 242, *sub-s.* 3.

On the trial of a petition against the election of the respondent to the office of town councillor, it was proved that two years before the election the respondent, with his wife, family, and furniture, moved into an inn kept by his mother, and a verbal agreement was entered into, by which the mother was to retire from the business, the respondent was to take it over, and the mother was to continue to reside in the house and have her board, lodging, and clothing free of charge. The respondent took over the entire management of the inn; but there was no assignment of the lease or transfer of the licence to the respondent, and the excise licences were still taken out in the mother's name, which remained alone over the door. The respondent requested that his name might be inserted in the rate book as joint occupier; but this was not done. The demand notes and receipts for rates during the twelve months preceding July 15 next before the election were made out in the mother's name; but the respondent paid the rates out of the profits of the inn. Before the publication of the lists next preceding the election, the respondent's name was inserted upon the burgess roll as joint occupier, his mother's name still remaining on the roll as joint occupier:—

Held, that the respondent was qualified by occupation and payment of rates, and was therefore "entitled to be enrolled as a burgess" within the meaning of the Municipal Corporations Act, 1882, s. 11, sub-s. 2 (*a*), and was duly elected.

There is no appeal from a decision of the High Court on a case stated under the Municipal Corporations Act, 1882, except by special leave of that Court.

CASE stated upon a petition against the return of the respondent to the office of town councillor of the borough of Workington.

The election was held on November 1, 1890, when the petitioner Frank Unwin and the respondent John McMullen were candidates, and the respondent was declared elected.

The petition alleged that the respondent was not duly elected, on the ground that, although enrolled as a burgess on the list of voters, he was not entitled to be so enrolled; that he was not on July 15, 1890, and had not been during the whole of the

preceding twelve months, in the occupation, joint or several, of any house, warehouse, shop or other building in the borough; that he was not on July 15, 1890, and had not been during the whole of the preceding twelve months, a tenant of any land in the borough of the clear yearly value of 10*l.*; that he had not been rated in respect of the alleged qualifying property to all the poor rates in the twelve months preceding July 15, 1890; and that he had not before July 20, 1890, paid any rates in respect of the alleged qualifying property made up to January 5, 1890. The petition prayed that it might be determined that the respondent was not duly elected, and that his election was void.

Prior to October, 1888, the respondent had been duly placed on the burgess roll for the borough of Workington in respect of a house in Harrington Road.

His mother, Margaret McMullen, had been for several years the tenant and occupier of the "Blue Bell" Inn, No. 18 King Street, in the borough, and was assessed at the sum of 30*l.*, and she had paid the poor and other rates upon that valuation.

In October, 1888, the respondent, at the invitation of his mother, gave up his house in Harrington Road, and removed with his wife, family, and furniture, to the "Blue Bell" Inn.

A verbal agreement was at the same time entered into between the respondent and his mother, by which she was to retire from the business, the respondent was to take it over from her, and she was to continue to reside in the house, and have her board, lodging, and clothing free of charge.

The respondent, with the assistance of his wife, took over the entire management of the inn, the mother ceasing to take any active part therein. There was no assignment of the lease to the respondent, nor transfer of the licence to him, and the excise licences were still taken out in the mother's name, which remained alone over the door without alteration.

In or about June or July, 1889, the respondent requested the assistant overseer to insert his name in the rate book as the joint occupier of the "Blue Bell" Inn. The assistant overseer said he would comply with his request, but did not do so, and the burgess roll was published on August 1, 1889, without his name being inserted.

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The demand notes and receipts for the rates of October, 1889, and April, 1890, were made out in the name of the mother, without any objection by the respondent, although he in fact paid the money out of the profits of the inn.

Prior to the publication of the lists on August 1, 1890, the assistant overseer had inserted the respondent's name upon the burgess roll as a joint occupier of No. 18 King Street, in the following form :—

Borough of Workington. No. 2, St. John's Ward.
Occupier's List. Division 1.

No.	Names of Electors in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
58	McMullen, John.	18 King Street.	Dwelling-house, joint.	18 King Street.

the mother's name still appearing as follows:—

Borough of Workington. No. 2, St. John's Ward.
Occupier's List. Division 3.

No.	Names of Electors in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
8	McMullen, Margaret.	"Blue Bell" Inn, 18 King Street.	House, joint.	"Blue Bell" Inn, 18 King Street.

The Commissioner who tried the petition was of opinion that the respondent was not duly elected, and that his election was void, but reserved his certificate, pending the opinion of the Court upon the following question: Under the circumstances above set forth, was the respondent qualified to be enrolled as a burgess for the borough for the year 1890-1891? If the answer should be in the affirmative, the election of the respondent was to be declared valid; if in the negative, to be declared invalid. (1)

(1) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9 (1.): "A person shall not be deemed a burgess for any purpose of this Act unless he is enrolled as a burgess.

(2.) "A person shall not be entitled

Mattinson, for the respondent. The respondent was duly elected, for he was "enrolled and entitled to be enrolled as a burgess" within the meaning of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 11, sub-s. 2 (*a*). He was qualified as joint occupier (s. 9, sub-s. 2, clause (*b*)), and by payment of rates (clause (*e*)). By s. 32, sub-s. 1, he is entitled, by having paid rates, to have his name put on the rate-book, and by sub-s. 2 of the same section his position is not altered by the failure of the assistant overseer to insert his name. The omission to enter the respondent's name in the rate-book is cured by 32 & 33 Vict. c. 41, s. 19, and 41 & 42 Vict. c. 26, s. 14: *Marsh* v. *Estcourt*. (1)

[He was stopped by the Court.]

Henn Collins, Q.C. (*Henry*, with him) for the petitioner. The respondent was not qualified to be elected. In order to be qualified a man must be entitled to be rated, and under this verbal agreement the respondent was in no better position than that of a lodger. The mother was the tenant of the house and the holder of the licence, and was therefore the sole occupier, for there can only be one holder of a licence of a public house, and that person must necessarily be entitled to exclude every

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to be enrolled as a burgess unless he is qualified as follows:

* * *

"(*b*) Is on the 15th of July in any year, and has been during the whole of the then last preceding twelve months, in occupation (joint or several), of any house, warehouse, counting house, shop, or other building (in this Act referred to as qualifying property) in the borough;

* * *

"(*e*) Has on or before the 20th of the same July paid all such rates, including borough rates (if any), as have become payable by him in respect of the qualifying property up to the then last preceding 5th of January."

By s. 11 (2.): "A person shall not be qualified to be elected or to be a councillor unless he

"(*a*) Is enrolled and entitled to be enrolled as a burgess."

By s. 32 (1.): "If an occupier of any qualifying property, whether the landlord is or is not liable to be rated to the poor rate in respect thereof, claims to be rated to the poor rate in respect thereof, and pays or tenders to the overseers of the parish where the property is situate the full amount of the poor rate last made in respect of the property, the overseers shall put the occupier's name on the rate book in respect of that rate.

(2.) If they fail to do so, he shall nevertheless for the purposes of this Act be deemed rated to that rate."

(1) 24 Q. B. D. 147.

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one else. The respondent resided in the house on sufferance.

CAVE, J. I am of opinion that our judgment ought to be in favour of the respondent.

The question is whether he was entitled to have his name placed on the burgess roll. Now it appears from the case that in October, 1888, the respondent moved into the premises in question, and entered into a verbal agreement with his mother, by which she was to retire from the business, and he was to take it over, and she was to continue to reside in the house and have her board, lodging, and clothing free of charge.

The respondent's mother never repudiated that agreement. On the contrary, both parties carried it out. According to the agreement, the respondent was to become the master of the business and occupier of the premises. It is not an uncommon thing among people in the class of life in which these people are to carry out transactions of this kind without having any formal agreement drawn up. In the present case the verbal agreement was carried out, and so long as this is done in fact it is sufficient. During the qualifying period the respondent was in occupation of the premises. On behalf of the petitioner reliance was placed on the fact that the respondent was not the holder of the licence of the public-house. It is true that the licence was not transferred to him; but in my opinion that fact makes no difference with regard to the question whether he was the occupier or not. The magistrates, if the respondent were to apply for a transfer of the licence, might or might not take notice of the fact that he had been carrying on the business without having obtained a transfer of the licence; but that is a question entirely for the magistrates, and does not affect the point now before this Court. What we have to consider is, whether the respondent was the occupier, and whether, as occupier, he was entitled to have his name placed on the burgess roll. It appears that he requested the assistant overseer to place his name on the rate book, but the assistant overseer, although he promised to insert the respondent's name, omitted to do so. The respondent pays rates, and therefore the case comes within the

Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 32. It is not necessary to deal with the point which was discussed by Wills, J., in *Marsh* v. *Estcourt* (1) as to personal payment of rates, for in the present case there were both a claim to be rated and payment of rates. The respondent was therefore entitled under s. 9 to be enrolled as a burgess, and was duly elected.

GRANTHAM, J., concurred.

Judgment for the respondent.

P. B. H.

The petitioner subsequently applied for leave to appeal, which was refused. The appeal, however, was entered, and came before the Court of Appeal on

1891. April 20. *Gully, Q.C.* (*Mattinson,* with him), for the respondent, objected that, as no leave to appeal had been given, the decision of the Divisional Court was final.

Jelf, Q.C. (*Henry,* with him), contrà. [*Line* v. *Warren* (2) and *Beresford Hope* v. *Lady Sandhurst* (3) were cited.]

THE COURT (Lord Esher, M.R., Fry and Lopes, L.JJ.), held that the objection was well founded, and dismissed the appeal.

Appeal dismissed.

Solicitors for petitioner: *Wood & Wootton, for T. Milburn, Workington.*

Solicitor for respondent: *H. Nelson Paisley, for Paisley & Falcon, Workington.*

(1) 24 Q. B. D. 147. (2) 14 Q. B. D. 548.
(3) 23 Q. B. D. 79.

A. M.

1891
April 10.

IN RE AN ARBITRATION BETWEEN WILLIAMS AND STEPNEY.

Arbitration—Award—Costs—Submission—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 2, 25.

By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act," one of which (i.) is that "the costs of the reference and award shall be in the discretion of the arbitrators or umpire," and by s. 25 the Act "shall apply to any arbitration commenced after the commencement of this Act (i.e., after January 1, 1890) under an agreement or order made before the commencement of the Act (i.e., before January 1, 1890)."

In an arbitration held after January 1, 1890, pursuant to a submission entered into before that date, which did not give power to award costs, costs were awarded by the arbitrators:—

Held, that s. 2 referred only to submissions made subsequently to the commencement of the Act, and that the word "arbitration" in s. 25 referred to the procedure of an arbitration as distinguished from the submission, and that the arbitrators had therefore no power to award costs.

APPLICATION on behalf of Sir E. Stepney, one of the parties to an arbitration, to set aside or refer back the award on the ground among others that the arbitrators had exceeded their jurisdiction in awarding that the applicant should pay the costs of the reference.

It appeared that the arbitration had been held and the award had been made during 1890. The reference was of certain claims by J. R. Williams upon the applicant under a lease of mines and minerals made between their predecessors in title in 1839, pursuant to an arbitration clause therein contained. This clause did not provide that the costs of references held under it should be in the discretion of the arbitrators.

William Graham, (with him *Glascodine*), in support of the application. The award should be remitted to the arbitrators for amendment. Under the submission, which is contained in the arbitration clause of the lease of 1839, they had no jurisdiction to award costs. It is incredible that s. 2 of the Arbitration Act, 1889 (1), which incorporates into submissions the provision in the

(1) By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, "A submission, unless a contrary intention is expressed therein, shall be deemed to

schedule with respect to the power of the arbitrators over costs, can have been intended to be retrospective; and here a "contrary intention is expressed" in the terms of the submission. As the reference was held in 1890, though pursuant to a submission made before that year, the effect of s. 25 has to be considered; but it would appear to be clear that the word "arbitration" in s. 25 refers to the proceedings before the arbitrator, and not to the submission.

W. B. Odgers, contra. It is submitted that, the arbitration having taken place after the commencement of the Act, the effect of s. 25 is that the date of the submission is immaterial; and that therefore by s. 2 the power as to costs contained in the provision in the schedule is made part of the submission, which contains no specific provision to the contrary effect.

MATHEW, J. I am clearly of opinion that the learned counsel for the applicant is right in his contention, and that this award must be sent back to the arbitrators in order that the direction as to costs may be struck out. It is said that the power to make this part of their award was conferred upon the arbitrators at the time when the Arbitration Act, 1889, came into operation. Now it is clear that up to that date it was competent to the parties to a submission to agree that the arbitrator should not have power to deal with the costs. That was the case as regards the submission in this proceeding. It is also clear that after the Act came into operation it continued to be competent to the parties to a submission to make an agreement to the same effect. But it is contended notwithstanding that it is necessary to

include the provisions set forth in the first schedule to this Act, so far as they are applicable to the reference under the submission."

By provision (i.) of the First Schedule, "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

By s. 25: "This Act shall not affect any arbitration pending at the commencement of this Act (i.e., by s. 29, Jan. 1, 1890), but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act."

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Mathew, J.

construe this Act in such a manner as to hold that, under a submission in which no power as to costs is given, s. 2 confers and is intended by the legislature to confer upon the arbitrator a power of awarding costs without the consent of the parties. Such a construction is contrary to the apparent intention of the statute, and I am constrained to say that such a construction would be to my mind unreasonable. I am unable to conjecture any ground upon which Parliament could have been induced to pass such an enactment. I think that effect may be given to the terms of the Act, and that the intention of the legislature will be carried out if we construe the word "submission" in s. 2 as referring to submissions subsequent to the Act, and the word "arbitration" in s. 25 as applying to the procedure of arbitration as distinguished from submission to arbitration. Effect may be given to s. 25 by holding that it brings to bear on references held subsequently to the Act the many general provisions with respect to the conduct of an arbitration which the Act contains. But I cannot suppose that the section is intended to control an agreement which the parties to a submission have deliberately entered into and to alter their contract without their consent.

DAY, J., concurred.

Application allowed.

Solicitors: *Field, Roscoe, & Co., for Johnson & Stead, Llanelly: Grundy & Co., for Home & Williams, Llanelly.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.
1891
March 12.

THE QUEEN *v.* THE COMMISSIONERS UNDER THE BOILER EXPLOSIONS ACT, 1882.

Boiler—"Closed Vessel for generating Steam"—Explosion of Boiler in a Mine—Jurisdiction of Board of Trade to order Inquiry—The Boiler Explosions Acts, 1882 *and* 1890 (45 & 46 *Vict. c.* 22, *and* 53 & 54 *Vict. c.* 35).

A boiler for generating steam was situate above-ground at a colliery, and a pipe conducted the steam down the shaft and along the working to a pumping engine in the mine. A valve in this pipe, in the mine and near the pumping engine, blew off. The Board of Trade ordered that an inquiry should be held by two commissioners under the Boiler Explosions Act, 1882, into the causes and circumstances attending the explosion. On an application for a prohibition to the commissioners so appointed to prohibit them from proceeding with the inquiry:—

Held (affirming the judgment of the Queen's Bench Division), that the repeal by s. 2 of the Boiler Explosions Act, 1890, of part of s. 4 of the Boiler Explosions Act, 1882, gives the Board of Trade jurisdiction to order such an inquiry:—

Held, also, that the pipe in which the explosion occurred was a "boiler" within the interpretation clause of the Boiler Explosions Act, 1882.

Rule, obtained on behalf of the prosecutors, the Tyne Coal Co., Limited, calling upon two commissioners appointed by the Board of Trade under the Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), to shew cause why a writ of prohibition should not issue directed to them to prohibit them from further proceeding with any inquiry into the causes or circumstances attending an accident to a stop-valve in one of the prosecutors' coal mines.

The affidavits used in support of the application for the order nisi disclosed the following facts: At one of the prosecutors' pits of the Hepburn Colliery, in the county of Durham, four boilers, connected together, were placed on the surface of the ground in a boiler-house, at a distance of 122 feet from the top of the shaft. The boilers were used for driving a hauling engine placed near the bottom of the shaft, and also for driving three pumping engines situated in the underground workings of the pit. A metal steam-pipe was attached to one of the boilers, and laid along the surface of the ground to the top of the pit shaft; from thence the pipe descended the shaft for a distance of 1056 feet.

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and was then laid along the workings for a distance of about 140 feet to a receiver used for the purpose of storing steam forced into it through the pipe from the boilers on the surface. The pipe was then continued from the receiver for a distance of 45 feet to one of the pumping engines used for pumping water from the workings of the mine to the surface. There were four valves upon the pipe—one close to the boiler, one at the bottom of the shaft, one near the receiver, and one close to the pumping engine. On September 16, 1890, all these valves were open except the one close to the pumping engine, and that valve blew off, and two men working near it were killed thereby.

The Board of Trade having, under s. 6 of the Boiler Explosions Act, 1882, directed a formal investigation of the causes and circumstances attending the explosion of the valve to be held by the two commissioners on November 12, 1890, the prosecutors on that day obtained this rule.

1891. March 2. *Sir R. E. Webster*, *A.G.*, and *Sir E. Clarke*, *S.G.* (*H. Sutton*, with them), for the Board of Trade, now shewed cause. The Board of Trade had power to direct the inquiry. The first question is whether the explosion of the valve in the steam-pipe was an explosion in a "boiler" within the meaning of s. 3 of the Boiler Explosions Act, 1882. It is submitted that it was. By s. 3, "the term 'boiler' means any closed vessel used for generating steam, or for heating water, or for heating other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes." The pipe was a "closed vessel used for generating steam." The pipe is continuous from the boiler to the receiver, and thence for a short distance to the pumping engine. The receiver is the same thing as a steam-chest placed over the boiler. It is no doubt put close to the engine, because the pressure is required to be close to the engine; but the fact that it is some 1300 feet from the boiler makes no difference. The pipe is also a closed vessel into which steam is admitted for "heating, steaming, boiling, or other similar purposes." The most common use of steam is to drive engines, and if the pipe is not one into which steam is admitted for "heating, steaming, or boiling," it is certainly used for "similar purposes,"

being a closed vessel into which steam is admitted for the purpose of driving an engine. The next question is whether the jurisdiction of the Board of Trade to direct an inquiry is still excluded by s. 4 of the Boiler Explosions Act, 1882, which enacts that "this Act shall not apply to any boiler used exclusively for domestic purposes, or to any boiler used in the service of Her Majesty, or to any boiler on board a steamship having a certificate from the Board of Trade, or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Act, 1872, or either of them." Sect. 2 of the Boiler Explosions Act, 1890 (53 & 54 Vict. c. 35), enacts that, "so much of s. 4 of the Boiler Explosions Act, 1882, as relates to any boiler other than a boiler used in the service of Her Majesty, or used exclusively for domestic purposes, is hereby repealed, and the said Act shall apply in the case of any boiler explosion occurring on board a British ship." The effect of the repeal cannot be so limited as to apply merely to boilers and not to boiler explosions, because the whole of the provisions in the Act of 1882 are directed to dealing with boiler explosions. It is obvious that the word "boiler" in s. 2 of the Act of 1890 means boiler which has exploded. The repeal does not, as may be suggested, relate only to boiler explosions on British ships. The legislature probably intended that two public bodies should have power to inquire into boiler explosions in coal mines. It was intended to enlarge the power of the Board of Trade to hold these inquiries, and power is given to them in all but the two excepted cases of boilers used in the service of Her Majesty, or used exclusively for domestic purposes. This construction is not inconsistent with anything in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58). By that Act the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), is wholly repealed, and by s. 83 "any enactment or document referring to any Act repealed by this Act, or to any enactment thereof, shall be construed to refer to this Act, and to the corresponding enactments thereof." That provision cannot apply to the Boiler Explosions Act, 1890. Its effect was that s. 4 of the Boiler Explosions Act, 1882, should be read into the Coal Mines

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Regulation Act, 1887, until the Boiler Explosions Act, 1890, which repealed that section, was passed. When the various sections in the Act of 1887, with respect to the power of the Secretary of State to deal with explosions in coal mines, are looked at, it is clear that there is nothing in them inconsistent with the power of the Board of Trade to hold inquiries into boiler explosions in coal mines under the Boiler Explosions Act, 1882. Sect. 35 of the Act of 1887 provides that notice shall be given within a specified time to the Secretary of State by the owner or agent of the mine where loss of life or personal injury occurs to any person in or about the mine "by reason of any explosion of gas, or of any explosive, or of any steam boiler." There is no definition of "boiler" in the Act. It has not the extended meaning given to the word in the Boiler Explosions Act, 1882; and if the Secretary of State had directed an inquiry in the present case under the Act of 1887, he would have been met with the objection that the pipe in which the explosion occurred was not a "steam boiler" within the meaning of the Act. Then s. 45 provides that the Secretary of State may direct formal investigations into explosions in mines by persons appointed by him under the Act. The whole of these provisions point to a narrower and more limited investigation than that which may be directed by the Board of Trade under the Boiler Explosions Act, 1882. The effect of them is only that in some cases the Secretary of State may, if he thinks it expedient, direct an inquiry of limited scope and character into boiler explosions in coal mines; but there is nothing which can be fairly construed as excluding the jurisdiction of the Board of Trade to exercise their larger powers of inquiry under the Act of 1882.

Moulton, Q.C. (*Danckwerts*, with him), in support of the rule. As to the question whether the Board of Trade have any power to direct an inquiry with respect to a boiler explosion in a coal mine, it is necessary to consider the course of legislation on this subject. When the Boiler Explosions Act, 1882, was passed, very extensive powers existed of inspection and inquiry, by specially competent persons appointed by the Home Office, with respect to accidents and explosions occurring in coal and other mines, and those powers were contained in the Coal Mines Regu-

lation Act, 1872, and the Metalliferous Mines Regulation Act of 1872, which were consolidating Acts. Then came the Boiler Explosions Act, 1882, which, by s. 4, specially excluded from the jurisdiction of the Board of Trade any "boiler explosion" into which an inquiry might be held under the Coal Mines and Metalliferous Mines Regulation Acts of 1872. In 1886 the powers given by the Coal Mines Regulation Act, 1872, were further extended. By the Coal Mines Regulation Act, 1886 (49 & 50 Vict. c. 40), s. 3, power was given to the Secretary of State to direct a formal investigation of any explosion or accidents to be held by inspectors and other competent persons appointed by him for that purpose. That power is re-enacted by s. 45 of the Coal Mines Regulation Act, 1887. The effect of s. 83 of that Act is only to substitute the Act of 1887 for the Act of 1872, so that s. 4 of the Boiler Explosions Act, 1882, must in future be read as referring to the Act of 1887 instead of to the Act of 1872. It is clear, therefore, that, at any rate until the passing of the Boiler Explosions Act, 1890, the jurisdiction of the Board of Trade was excluded with respect to any explosion into which an inquiry might be held under the Coal Mines Regulation Act, 1887. The Boiler Explosions Act, 1890, does not repeal the provisions of s. 4 of the Boiler Explosions Act, 1882, so far as those provisions relate to boiler explosions in coal mines. Sect. 4 provides that this Act shall not apply to three specified classes of "boiler," namely, any boiler used exclusively for domestic purposes, or in the service of Her Majesty, or on a steamship having a certificate from the Board of Trade. The language is then changed, and proceeds, "or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872." By s. 2 of the Act of 1890 two classes of boilers are to be continued as exceptions; the third is to be no longer an exception. There is no repeal of the exception with respect to "any boiler explosion" into which an inquiry may be held under the Coal Mines Regulation Acts. The intention was simply to strike out the exception with respect to British ships, and the words, "and the said Act shall apply in the case of any boiler explosion occurring on board a British ship," merely indicate the effect of so doing. It could not have

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been intended that jurisdiction to hold inquiries into boiler explosions in coal mines should be exercised by two different bodies, the power of the Home Office to direct such inquiries being already sufficiently wide and ample. Secondly, the pipe at the place where the explosion occurred was not within the interpretation of "boiler" in s. 3 of the Act of 1882. It is a closed vessel for holding, but not for generating, steam, which is generated in the boiler. The other words of the definition, "or into which steam is admitted for heating, steaming, boiling, or other similar purposes," do not cover this case. The pipe is a mere conduit-pipe for the purpose of passing on to the engine steam generated in the boiler.

CAVE, J. I am of opinion that this rule should be discharged. Two points have been made by counsel for the prosecutors. First, it is said that s. 2 of the Boiler Explosions Act, 1890, does not repeal the last two exceptions contained in s. 4 of the Boiler Explosions Act, 1882. I admit that s. 2 is somewhat difficult of construction, and that it might very well have been expressed with greater clearness and precision; but, upon the whole, I think it is impossible to restrict its meaning in the way contended for. It begins: "So much of s. 4 of the Boiler Explosions Act, 1882, as relates to any boiler." Now, stopping there for a moment, what s. 4 says is: "This Act shall not apply to any boiler used exclusively for domestic purposes, or to any boiler used in the service of Her Majesty, or to any boiler on board a steamship having a certificate from the Board of Trade, or to any boiler explosion." It seems to me to be impossible to say that so much of that part of that section as relates to a boiler explosion does not relate to a boiler. We know in point of fact that all the former part, which speaks of a boiler simply, relates to a boiler explosion, because it is not until there has been an explosion that the Act of 1882 comes into operation at all. Suppose there had been a series of provisions in s. 4 of the Act of 1882, some of them relating to the cleaning, and others to the repair of boilers, and others to the explosion of boilers. It would have been quite impossible to say that the whole of those provisions did not relate to boilers, and that a distinction should be made

between those which related to the cleaning and repair of the boiler, and those which related to a boiler explosion, and it would have been impossible to say that whereas the former related to a boiler the latter did not. Nor, again, can we draw a distinction and say that, when the word "boiler" is used in one part of s. 2 of the Act of 1890, so much of s. 4 of the Act of 1882 as speaks of a "boiler" is repealed, and that when another part of s. 2 of the latter Act speaks of "boiler explosion," that part of s. 4 of the former Act which speaks of a "boiler explosion" remains in force, because a provision with regard to an explosion of a boiler does not relate to a boiler. I must admit that s. 2 of the Act of 1890 has been made as difficult of construction as possible. However, giving what I think is the natural meaning to the words—which we must always do unless we see some very good and strong reason to the contrary—I come to the conclusion that the latter part of s. 4 of the Act of 1882 has been repealed by s. 2 of the Act of 1890.

The other point was whether this explosion was an explosion in a boiler. Now, "boiler" is by the interpretation clause to mean "any closed vessel used for generating steam"; and it appears to me that the whole of this instrument down to the place where the valve blew out was a "closed vessel used for generating steam." The pipe, undoubtedly, was necessary for the purpose of carrying steam from one point to another; but, the valves being open along the whole course, the whole was one closed vessel, and the use to which that vessel was being put at that moment was for the purpose of generating steam. Let me put an illustration which, I think, tends to shew that that must be the correct interpretation. A closed vessel into which steam is admitted for boiling purposes is within the section. Let us suppose that at the point where the valve blew off there had been another vessel into which steam was admitted from time to time for boiling purposes. If the steam were admitted through a valve into that vessel, and whilst that vessel was being used for boiling purposes there was an explosion in that vessel, it clearly would have been within the Act, and so would an explosion in that part of the boiler which is in contact with the fire. That is admitted; but it is said that an explosion in the intermediate line

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of pipe, which was merely a link from one to the other, would not come within the meaning of the section. I do not agree with that contention. It seems to me that the closed vessel which conveys the steam to the place where the explosion took place is exactly as much within the mischief against which the section was directed as the closed vessel into which the steam passing through the steam-pipe is admitted for the purpose of boiling or steaming would be. I think, therefore, that the proper view is that the whole pipe from the boiler down to the valve placed close by the receiver was, at the time when it was being used in this way, one closed vessel used for the purpose of generating steam, and, therefore, within the definition in s. 3 of the Boiler Explosions Act, 1882.

CHARLES, J. I am of the same opinion. I think that the pipe, at the place where this accident happened, was a boiler. It was a closed vessel used for the purpose of generating steam. I will not go through the reasons for this opinion; my learned brother has given them fully.

Upon the other point, I for some time did entertain considerable doubt; but upon reflection I cannot but think that the real effect of s. 2 of the Act of 1890 is to leave unrepealed the first two lines and a half, and those two lines and a half only, of the 4th section of the Act of 1882. The language of s. 2, it is true, only relates to the repeal of the earlier section so far as that earlier section relates to any boiler, and does not use the words "boiler explosion"; but, inasmuch as the only boilers referred to in the Act of 1882 are boilers which in fact have exploded, and the only topic with which that Act deals is the explosion of boilers, I think it would be too narrow a construction of s. 2 of the Act of 1890 to limit it in the way suggested, which would make it repeal the 4th section of the earlier statute only so far as it relates to boiler explosions on board steamships having certificates from the Board of Trade. It may be that the result is to leave the prosecutors in this case liable to the control of a dual authority. That is not a matter for us, but for the legislature to consider. I think, upon the whole, that the 2nd section of the Act of 1890 repeals the whole of the 4th section of the

Act of 1882, except so far as that section deals with boilers exclusively used for domestic purposes, or any boiler used in Her Majesty's service.

Rule discharged.

W. A.

1891. March 12. The prosecutors appealed.

Sir H. James, Q.C., and *Moulton, Q.C.* (*Danckwerts*, with them), in support of the appeal.

Sir R. E. Webster, A.G. (*H. Sutton*, with him), contrà.

LORD HALSBURY, L.C. I am of opinion that this appeal should be dismissed.

The first question propounded to us is the true construction of the Act of 1890 as amending the Boiler Explosions Act, 1882. The last-mentioned Act enacted, among other things, that the Act should not apply to "any boiler used exclusively for domestic purposes, or to any boiler used in the service of Her Majesty, or to a boiler on board a steamship having a certificate from the Board of Trade"—in other words, to passenger steamers—"or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Act, 1872, or either of them." In the year 1890 the Act of Parliament which is now under consideration enacted that s. 4—which is the section I have just read—should, so far as relates to any boiler other than a boiler used in the service of Her Majesty, or used exclusively for domestic purposes, be thereby repealed, "and the said Act shall apply in the case of any boiler explosion occurring on board a British ship." Now, it appears to be contended that an inquiry into a boiler may be separated from an inquiry into a boiler explosion, the fact being that the Act of 1882 has no operation except upon a boiler which has exploded, and no inquiry can take place unless there has been a boiler explosion, and we are invited to reduce the Act of Parliament to such a condition that it is supposed to strike out the particular words to which I have referred, and to leave in operation the words, which are themselves words of exception, relating to a boiler explosion capable

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of being inquired into under the Metalliferous Mines Regulation Act and the Mines Regulation Act. For my own part, I do not see, what has been urged before us, that there is any very extraordinary contradiction in there being the double process of investigation. The legislature, for reasons which seemed sufficient to it, have thought proper to enact that in respect of all accidents in a mine there shall, or may, if it is thought right by the proper authority, be an inquiry into the causes and circumstances attending it. As a totally different and totally distinct head of inquiry it is thought right also to enact that where there is a boiler explosion there shall be, or may be, an inquiry in respect of the causes and circumstances attending the explosion. The legislature has confided the inquiry into those matters to two different departments of the Government; and I think one may safely conclude that where the Government itself is the intervening party and is conducting the inquiries by different departments of the State, there would be no friction or opposition between the two departments, but that they would mutually assist each other. If I came to a different conclusion, or thought that it was inconvenient, or even that it might lead to unpleasant results, that there should be two inquiries operating upon the same subject-matter, although one, it must be observed, is a much narrower and more limited inquiry than the other, yet I should be wholly unable to get over the specific and distinct language of the section itself. It seems to me absolutely impossible to suppose that, the legislature having the section before them with which they were dealing and expressly legislating upon the footing of it, and leaving out from what I will call, for this purpose, the preserving part of the clause, the Metalliferous Mines Act and the Mines Regulation Act, we are nevertheless to construe the Act as if those words had been left in. It seems to me that that would reduce the legislation to such an absurdity that I should hesitate very much before coming to any such conclusion. I am of opinion, without the least doubt or hesitation, that the section of the Act of 1890 has in fact repealed the particular exemption which is now insisted on as still in existence.

In what I have hitherto said, I have assumed that this was an explosion within the meaning of the Act, and an explosion of a

boiler; but the remaining point is to consider whether this thing in which the explosion took place is a boiler within the meaning of the Act. The word boiler is not a scientific but a popular word. It is a known instrument with reference to certain classes of machinery, and, for my own part, I should be disposed to take the popular view of a boiler, that it is something to boil water in and whereby steam is made. My impression is, that the nozzle of a kettle, however long, is part of the kettle, and that it is part of the instrument which generates the steam, and if the nozzle of the kettle be protracted for a considerable distance, provided the object is to keep in that vessel the steam generated by the application of heat to the water, it is just as much a boiler as if it were of different shape. And indeed one may try this question by asking oneself, if instead of having a long pipe a great many yards long, it had been a very large pipe immediately over the place where the water was boiled, would it be the less a boiler, being the part of the instrument in which the steam was in fact made, and which, if the pressure of the steam was too great for the containing power of the vessel, might cause an explosion, the whole policy and purpose of the Act being to have an inquiry into accidents which have produced loss of life or injury to person by reason of imperfect and insufficient instruments for the purpose of containing steam where steam is generated. I am by no means prepared to say that if the word "boiler" were the only word in the Act, I should not come to the conclusion that this pipe was part of the boiler, because, if I understand the facts as stated to us, this vessel, which was admitted on all hands to be generating steam, has a continuous flow of steam from the point were it rises from the water to the place at which the explosion took place; otherwise, there would be this somewhat strange result, that if an explosion took place a foot or an inch from the place where the steam rose from the surface of the water, it would be an explosion of the boiler within the meaning of the Act, whereas, if it took place a yard or two away, where the shape of the vessel containing the steam had altered its character into a narrow shape, or a longer shape, or a tubular shape, then that it would be no longer in any part of the boiler, and that although it would be within

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the mischief which the Act was intended to meet, it would be excluded from its operation. But I am not remitted in this case to the difficulty of giving a construction to that part of the section, because the person who drew this Act of Parliament had in his mind apparently the possibility of such ingenious arguments as we have had addressed to us to-day, and for the purpose of avoiding any such subtle criticism of words he has introduced into the interpretation clause, that in this Act the term "boiler" means "any closed vessel used for generating steam, or for heating water, or for heating any other liquids, or into which steam is admitted for heating, steaming, boiling, or any other similar purposes." I am of opinion that the facts of this case bring the particular instrument with which we are dealing within both of those descriptions. I am of opinion that, in the first place, the pipe here was a closed vessel, not closed absolutely in the sense in which Mr. Moulton used the words, because neither a boiler nor any of the appliances of a boiler is absolutely closed, but closed in the sense in which any engineer as well as any member of the legislature would suppose the word to be used—so confined as to keep the steam within it and as to give rise to danger of explosion. When the particular instrument with which we are dealing is looked at, the matter comes to this—that the steam made by the boiling of the water is conducted from the surface of the water in the first instance by a larger vessel, and then by a gradually smaller one, a great many yards down, until it gets below into the mine for the purpose of being admitted alternately into the parts of the piston which drives the engine. I am therefore of opinion, that it is a boiler in that enlarged sense in which the Act of Parliament has permitted the words to be used, "a closed vessel used for generating steam." I also think that it is a vessel into which steam is admitted for heating, steaming, boiling, or other similar purposes. Although I am not prepared to say that the words are most felicitously chosen, it appears to me that the whole meaning of that is—any instrument into which the steam itself which may give rise to an explosion is admitted for the purpose of being further used for either of the purposes there indicated. It appears to me that what the Act of Parliament intended by

"steaming," was the use of steam for such purposes as a boiler is used for. I think, therefore, that both parts of the definition have hit this particular instrument which is now under consideration, and I am therefore of opinion that it is a boiler within the meaning of the statute; and under these circumstances this appeal ought to be dismissed.

LORD ESHER, M.R. In this case a steam engine in a mine, or that part of it which was down the mine, has exploded and has injured or killed people, and thereupon the Board of Trade has ordered an inquiry into the matter. The application to the Court is to prohibit the commissioners from holding that inquiry on the ground that the board has no jurisdiction to order it to be held, but that it was the Home Secretary who ought to have directed the inquiry. I cannot help thinking that neither the draftsman nor the committee which passed the Act of 1890 could have been scientific persons, and I think that whoever is responsible drew the Act in a very indifferent form. The Act of 1882 is applied to the explosion of boilers, and if there were no exceptions in it it is obvious that the general words would have included a boiler explosion in a mine; but in that Act there is a section which creates exceptions, taking out from the general words and their application boilers in mines, because, as it is suggested, it was known that an explosion of a boiler in a mine might be dealt with by another authority under the Mines Regulation Acts. There being then an exception in the statute of 1882 which excepts from the jurisdiction of the Board of Trade an explosion of a boiler in a mine, the Act of 1890 does away with that exception. I think that it cannot be doubted that the difference between the effect to be given to the expressions "boiler" and "boiler explosion" in that Act is infinitesimal, and cannot have any effect in the construction of the section. Thus the Board of Trade has given to it the jurisdiction which it would have had if there had not been the exception in the Act of 1882. If the Board of Trade has the jurisdiction this prohibition cannot go. It is said that it is very inconvenient that the Board of Trade should have jurisdiction, because it is not denied that the Home Secretary has jurisdiction under the Mines

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Regulation Act. The inconvenience is manifest in my opinion, and if I could have done so properly I should have been very willing to hold that the sole jurisdiction was in the Home Secretary; but if any mistake has been made, it is not the province of this Court to legislate so as to cure defects, and all that we have to say here is that this case is within the Act of 1882 as amended by the Act of 1890, and that, therefore, the Board of Trade have jurisdiction. Then comes the next question. It was said that this was not the explosion of a boiler. If the Act had dealt with the explosion of a boiler and in some other section with an explosion in pipes or in any other specified thing, the matter would be easy; but the draftsman has gone upon that which to my mind is a dangerous method of drawing Acts of Parliament. He has put in a section which says that a boiler shall mean something which is in reality not a boiler. This 3rd section of the Act of 1882 is a peculiarly bad specimen of the method of drafting, which enacts that a word shall mean something which in fact it does not mean. "In this Act the term 'boiler' means a closed vessel used for generating steam." I should have thought that they might just as well have said "steam boiler," or any other simple term. Now, "boiler" is to mean "a closed vessel used for generating steam or for heating other liquids, or a closed vessel into which steam is admitted for heating, steaming, boiling, or other similar purposes." All those things are to be included in the term "boiler" as it is used in other parts of the Act. Is this pipe where the explosion took place within any of these definitions? The purpose of this Act was to deal with explosions of steam. Are we to leave out, unless we are obliged to do so, one of the most common closed vessels in which there may be an explosion of steam? We have had it scientifically explained to us in what part of the machine the steam is generated, and what is done with the steam when it is generated. I apprehend that in this Act it was not meant to draw these scientific distinctions, but to deal with the thing in which there is steam under pressure which is likely to explode. Therefore, when the Act says "a closed vessel used for generating steam," I think it means the whole machine in which the steam is made or produced, and where it is under pressure until it is allowed to go from that

machine into something else for different purposes. If so, it clearly in this case includes the boiler proper in which the steam is generated, and the pipe through which that steam goes, and the vessel into which it is received—the whole machine in which it is held—until it goes out of that machine for some other purpose. If that be true, the place where this explosion took place was in that machine; and therefore I agree with the judgment of the Divisional Court on the grounds on which it is given, that this explosion was, within the meaning of this section, in a "closed vessel used for generating steam."

Now, if that is the meaning in this section of the "closed vessel for generating steam," it becomes immaterial to consider what is the meaning of the rest of the section dealing with closed vessels into which steam is admitted for "heating," or for "steaming," or for "boiling," or for "other similar purposes"; although, as I said before, I think it is very bad drafting that these matters should be introduced by the interpretation clause instead of being dealt with in the section in plain language. As I have already said, I think that the judgment of the Divisional Court was right on both the points raised, and upon the grounds upon which it was given.

FRY, L.J. Upon the first point, with regard to the operation of the Act of 1890 and the Act of 1882, I entirely concur in what has been said by the Lord Chancellor and the Master of the Rolls. The point appears to me to be a very simple one; and if it had not been argued I should not have thought it arguable.

Upon the second point, I confess I had much more difficulty. I had great doubt whether the spot in the pipe at which this explosion occurred was, in popular language, a part of the boiler, or a part of the boiler within the meaning of that word as defined by s. 2 of the Act of 1882; but with the Lord Chancellor and the Master of the Rolls concurring with the Court below, my opinion becomes immaterial; and I feel that the construction which they put upon it is more beneficial than that which appears to me to be the more exact one, and which I should

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probably have put upon it if I had not been aided by their views.

I, therefore, confine myself, with regard to this point, to expressing the doubt which I have entertained.

Appeal dismissed.

Solicitors for prosecutors: *Rowcliffes, for Philipson, Cooper, & Goodger, Newcastle-upon-Tyne.*

Solicitor for defendants: *The Solicitor to the Board of Trade.*

A. M.

April 21.

THE QUEEN *v.* POWELL AND OTHERS, JUSTICES OF THE PEACE OF THE HUNDRED OF SWANSEA.

Licensing Acts—Change of Occupation—Transfer—Grant of Licence to new Tenant under 9 *Geo.* 4, *c.* 61, *s.* 14—*Application by same Tenant for a Second Licence under same Section—Jurisdiction of Justices.*

The tenant of a beerhouse, being duly licensed, gave up possession of the premises, and another person became tenant of the house in his stead. The new tenant applied for and obtained at a special transfer session a grant of a licence under 9 Geo. 4, c. 6, s. 14, to himself as being the "new tenant or occupier of the house having so become unoccupied." Such licence expired in the ordinary course on October 10 then next ensuing. Subsequently to the expiration of such licence, he applied at another special transfer session for a grant to him under the same section of a second similar licence to enable him to carry on the business of a beerhouse keeper until the succeeding October 10:—

Held, that he had ceased to fill the character of "new tenant" within the meaning of the section, and that the justices had no jurisdiction to grant the licence.

MANDAMUS to justices.

In August, 1889, one Thomas John was the duly licensed tenant of a certain beerhouse, holding a licence which would expire on October 10, 1889; but, being about to give up possession of the premises, he did not apply for a renewal of his licence at the general annual licensing meeting, which was held on August 30. On September 2, he gave up possession, and on the same day one Roberts entered into occupation as tenant of the house. On September 27, Roberts applied at the adjourned general annual licensing meeting for a new licence, which the justices in their discretion refused. On the same day, September 27, a special session was held for the grant of licences under s. 14

of the Licensing Act, 1828 (9 Geo. 4, c. 61). (1) Roberts accordingly applied to the special session under that section for a grant to him, as being the new tenant of the house which had become unoccupied by the removal of John, of a licence to sell beer therein by retail until the ensuing October 10. Such licence was duly granted to him. On January 3, 1890, Roberts applied at another special transfer session for a grant to him under the same section of a second similar licence to enable him to sell beer on the premises until October 10, 1890. The justices refused the application on the ground that Roberts was not then a "new tenant" within the meaning of the section, and that they had consequently no jurisdiction to grant it.

Roberts then obtained a rule nisi in the nature of a mandamus to the justices to hear and determine his application.

David Lewis, for the justices, shewed cause. It is impossible for an applicant under s. 14 to bring himself on more than one occasion within the description of a "new tenant." It may be that the section provides no limit of time within which he must apply, and indeed it has been held that he need not apply during the currency of the outgoing tenant's licence: *Reg.* v. *Justices of Liverpool*. (2) But there must be some limit to his right of application, as a man cannot go on being a new tenant all his life. The limit is reached when once he has obtained a licence, no matter for how short a time. The "person so licensed" in succession to whom Roberts, on January 3, proposed to carry on the business of a beerhouse keeper, was not John, the person who had given up possession, but himself, whose possession had never ceased. He was therefore not within the

(1) 9 Geo. 4, c. 61, s. 14, provides that, "If any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in the licence . . . . it shall be lawful for the justices assembled at a special session . . . . to grant . . . . to any new tenant or occupier of any house so becoming unoccupied . . . . a licence to sell excisable liquors by retail . . . . provided always that every such licence shall continue in force only from the day on which it shall be granted until (elsewhere than in Middlesex or Surrey) the 10th day of October then next ensuing."

By 33 & 34 Vict. c. 29, s. 4, sub-s. 5, the provisions of the above section are applied to beerhouses.

(2) 11 Q. B. D. 638.

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section. His proper course was either to have applied on September 27, at the general annual licensing meeting, for a renewal to himself of the licence held by John, which, on the authority of *Reg.* v. *Justices of Liverpool* (1), he might have done, or else to have abstained from opening the house until after October 10.

Poland, Q.C., and *James Paterson*, in support of the rule. There is nothing in the section to preclude a person from applying twice. If Roberts had applied for the first time on January 3 he clearly would have been within the section; but surely it cannot have been intended that the enjoyment of a licence under the section for the short period of thirteen days should take away his right.

A. L. SMITH, J. This is a motion by a person of the name of Roberts, to make absolute a rule for a mandamus to the justices of Swansea to hear and determine an application for the transfer to him of a licence to sell beer on the premises formerly occupied by one Thomas John. The justices refused the application on the ground that they had no jurisdiction to grant it. The question whether they were right in so doing depends upon the true construction to be put on s. 14 of the Licensing Act, 1828. It appears that on September 2, 1889, John, being the tenant of a beerhouse, in which he was then duly licensed to sell beer, gave up possession of the premises, and on the same day Roberts entered into occupation of them. Under those circumstances, if Roberts had held his hand, and had abstained from obtaining a licence in the interval between that date and January 3, 1890, I quite agree that the justices would have had jurisdiction on that latter date to grant the licence sought, for the case would have come directly within the decision in *Reg.* v. *Justices of Liverpool.* (1) But he was not content so to abstain; and on September 27 he applied for a licence under s. 14 of the Act of 1828. He obtained the licence, but only enjoyed the benefits of it for some thirteen days, as in accordance with the terms of the section it necessarily expired on October 10, 1889. Then on January 3, 1890, he applied for a further licence under the same section to enable

(1) 11 Q. B. D. 638.

him to carry on the business of a beerhouse keeper until the following October 10. But the justices held, and I think rightly, that an applicant does not bring himself within the terms of the section where in the interval between the removal of the previous tenant and the date of the application he has already obtained a licence. In my opinion, only one licence can be granted to one and the same person under that section. The same person cannot twice bring himself within the description of a "new tenant." The section says that "if any person so licensed . . . shall remove from or yield up the possession of the house specified in such licence . . . it shall be lawful for the justices to grant . . . to any new tenant or occupier of any house having so become unoccupied." That must mean to the immediate new tenant not already having obtained a licence.

GRANTHAM, J. The only question is, whether the justices could lawfully grant a licence under s. 14, having already granted a licence under the same section to the same tenant. I think not. If they could, there would be nothing to prevent a man going on obtaining such licences year after year for the rest of his life.

Rule discharged.

Solicitor for applicant: *R. White, for J. A. Thomas, Swansea.*
Solicitor for justices: *R. White, for Jenkin Jones, Swansea.*

J. F. C.

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THE QUEEN *v.* WILKINSON AND ANOTHER, JUSTICES OF THE WEST RIDING OF YORKSHIRE.

Poor Law—Practice—Suspension of Order of Removal—Costs of Maintenance of Pauper during Suspension—Order for Payment of—Whether ex parte or on Summons—35 *Geo.* 3, *c.* 101, *s.* 2—4 *&* 5 *Will.* 4, *c.* 76, *s.* 84.

Where an order for the removal of a pauper has been suspended in consequence of the pauper's inability to travel, an application to justices by the removing union, for an order for the payment by the union to which the pauper belongs, of the costs of his maintenance during the period of suspension, must be made upon summons and not ex parte.

CERTIORARI to bring up an order of justices to be quashed.

On March 11, 1890, an order of justices was made for the removal of one Mary Watson, a pauper, from the Hunslet Union to the Leeds Union. On the same day an order suspending the execution of such order of removal was made by the same justices on the ground of the ill-health of the pauper. Notice of such order of removal was duly given to the Leeds Union, and no appeal was brought against such order. The pauper died without having been removed, and subsequently on December 30, 1890, an order of justices was made for the payment by the Leeds Union to the Hunslet Union of the sum of 11*l.* 9*s.*, as having been necessarily expended and incurred by the Hunslet Union by the suspension of the order of removal. Such order was made without any notice to the Leeds Union, and without their having any opportunity of questioning the propriety of the amount. A demand for the payment of such sum having been made upon the Leeds Union, they obtained a rule nisi for a writ of certiorari to bring up the order for payment to be quashed, as having been made without jurisdiction.

Jelf, Q.C., and *Macmorran*, for the Hunslet Union, shewed cause. The universal practice has hitherto been to make orders for the costs of maintenance under suspended orders of removal ex parte. The question is whether that practice is legal. By 35 Geo. 3, c. 101, s. 2, it is provided that where a pauper, liable to be removed, is from sickness unable to travel, the justices

making the order of removal may order the suspension of its execution until it may be safely executed, and that in the event of the pauper being ultimately removed or dying before removal, the justices may order the parish of settlement to pay to the removing parish the costs of the pauper's maintenance during the suspension; and that if within three days after demand such costs are not paid, or, in cases in which the amount of such costs is over 20*l.*, notice of appeal to the quarter sessions is not given, they may issue a distress warrant. The form of such order for the payment of maintenance, which has invariably been used, and is to be found in Archbold's Poor Law, 14th ed. p. 638, is ex parte. There is nothing in the Act which suggests that notice is to be given to the parish of settlement; on the contrary, the fact that an appeal to the quarter sessions on the question of quantum is given where the amount exceeds 20*l.*, suggests that no opportunity of disputing the amount was intended to be given when it was under that sum. It is to be observed that the amount has to be proved upon oath before the justices, and it was probably thought that the requirement of an oath was sufficient to satisfy justice where the amount was small. It will, however, be contended on the other side that the provisions of that section, and the practice prevailing under it, have been repealed by s. 84 of the Poor Law Act, 1834 (4 & 5 Will. 4, c. 76), by which it is enacted that all expenses of maintenance of a pauper who shall be adjudged to be settled elsewhere than in the maintaining parish, may be recovered from the parish of settlement "in the same manner as any penalties or forfeitures are by that Act recoverable"—that is to say, upon complaint and summons before a Court of Summary Jurisdiction. It is conceded that the expenses of maintenance referred to include expenses under a suspended order of removal. But it is contended that the remedy provided by that section is not in substitution for the old practice, but is cumulative. The two remedies are not inconsistent, for the later Act is wider in its operation than the earlier Act, and includes cases in which the pauper has become irremoveable by residence, whereas the earlier act was limited to cases in which the pauper either died or was actually removed. This was the view taken by Erle, J., and Lord

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Campbell, C.J., in *In re Chedgrave.* (1) Moreover, in *Reg.* v. *Higginson* (2) (decided in 1862), where an order for the payment of costs of maintenance, under a suspended order of removal, had been made ex parte under the Act of 35 Geo. 3, it was held that, upon the hearing of a complaint for non-compliance with such order, the justices could not inquire into its propriety, but were bound to issue their distress warrant, notwithstanding that, the amount being under 20*l.*, there was no appeal against the order.

Bosanquet, Q.C., and *R. Cunningham Glen*, for the Leeds Union, in support of the rule. Even assuming that at one time such orders were rightly made ex parte under the provisions of the Act of 35 Geo. 3, that practice is now repealed by the combined operation of s. 84 of the Poor Law Act, 1834, and s. 6 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which latter section provides that "Where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a Court of summary jurisdiction . . . such sum shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise."

[They were stopped by the Court.]

LORD COLERIDGE, C.J. I am of opinion that this rule must be made absolute. Prior to the passing of the 4 & 5 Wm. 4, c. 76, the law relating to the poor had got into a very disastrous condition, and that Act was passed with the object of remedying that condition. It was intended to create a new code of poor law, and to substitute a new system for an old one. If, therefore, we find any provisions in that Act which are inconsistent with the practice under any earlier Act, such earlier practice must be taken to be repealed. In my judgment, the practice under s. 2 of 35 Geo. 3, c. 101, was altogether inconsistent with the provisions of s. 84 of the Act of Wm. 4; and after the passing of the later Act could no longer be defended. If, however, any doubt could be entertained as to the practice under the Act of George III. having been repealed in 1834, there can be no doubt

(1) 20 L. J. (M.C.) 23. (2) 31 L. J. (M.C.) 189.

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that it is repealed now, having regard to the language of s. 6 of the Summary Jurisdiction Act, 1879.

MATHEW, J. I am of the same opinion. The statute of William IV. was an amending Act. It amended the procedure under the earlier Act relating to the recovery of the expenses occasioned by the suspension of orders of removal—a procedure which sorely needed amendment. The writ of certiorari must issue.

Rule absolute.

Solicitors for Leeds Union: *Smiles, Ollard, & Yates, for Clarke & Sons, Leeds.*

Solicitors for Hunslet Union: *Pitman & Sons, for Elmsley, Son, & Smith, Leeds.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

March 11; *April* 29.

EX PARTE THE COUNTY COUNCIL OF KENT AND THE COUNCIL OF THE BOROUGH OF DOVER. IN RE THE LOCAL GOVERNMENT ACT, 1888.

EX PARTE THE COUNTY COUNCIL OF KENT AND THE COUNCIL OF THE BOROUGH OF SANDWICH. IN RE THE LOCAL GOVERNMENT ACT, 1888.

Local Government—Transfer of Powers to County Council—Question for opinion of High Court—Right of Appeal to Court of Appeal—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), s. 29.

The jurisdiction of the High Court of Justice upon questions submitted to it under s. 29 of the Local Government Act, 1888, is consultative only, and not judicial, and no appeal lies from its decision to the Court of Appeal.

APPEAL of the County Council of Kent from a decision of the Queen's Bench Division upon certain questions submitted to the High Court of Justice under s. 29 of the Local Government Act, 1888, by the County Council of Kent and the Councils of the boroughs of Dover and Sandwich. The proceedings in the Divisional Court are reported. (1)

1891. March 11. *Henn Collins, Q.C.* (*J. V. Austin* with him for the Council of the borough of Dover, and *H. F. Dickens* with

(1) Ante, p. 389.

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him for the Council of the borough of Sandwich). There is a preliminary objection to this appeal. No appeal from a decision of the High Court under s. 29 of the Local Government Act, 1888 (1), lies to this Court. That section gives to the High Court a jurisdiction which is consultative only and not judicial, and which is in terms to be exercised by it without prejudice to the ordinary rights of the parties. The "decision" of the High Court is not an order or a judgment, and there are no means of enforcing it. It is true that in *Overseers of Walsall* v. *London and North-Western Railway Co.* (2), the House of Lords held that the jurisdiction of the High Court upon questions relating to the validity of parochial rates was not purely consultative, and that its decisions upon such matters were open to appeal; but their judgment proceeded upon the ground that the machinery of a rule to quash an order of sessions gave a right of appeal, a "rule" being by s. 100 of the Judicature Act, 1873, included in the term "order," and there being by s. 19 of that Act, a right of appeal from any "order" of the High Court. In the present case there is no "rule" of the High Court, and s. 19 of the Judicature Act, 1873, under which section alone there can be, if at all, a right of appeal, only contemplates that orders which are capable of enforcement are to be the subject of appeal. It is clear from the decision in *Cox* v. *Hakes* (3), that the right of appeal and the right of execution or enforcement are correlative terms. The intention of the legislature was to provide the different local authorities with an easy method of obtaining the opinion of the High Court upon questions as to transfer of powers, extending not merely to questions that were actually in controversy, but also to questions that might possibly

(1) By 51 & 52 Vict. c. 41 (The Local Government Act, 1888), s. 29. "If any question arises, or is about to arise, as to whether any business, power, duty, or liability, is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of Court may be directed by the Court; and the Court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question."

(2) 4 App. Cas. 30.

(3) 15 App. Cas. 506.

arise, and which might very possibly be merely academic questions, not likely to result in litigation.

Channell, Q.C., and *Gore*, for the County Council of Kent. The legislature have in s. 29 provided a summary mode of getting a decision upon numerous questions which it was apprehended would arise upon the Act coming into operation, and it must have intended the decision of the High Court to be binding and capable of enforcement, in which case it would be appealable. The expression "in a summary manner," merely refers to procedure, and is intended to enable the parties to dispense with the machinery of a writ or a rule.

[LORD HALSBURY, L.C. As to the meaning of those words I agree with you.]

In *Mayor of Over Darwen* v. *Justices of Lancashire* (1), the Court of Appeal entertained without challenge an appeal from the decision of the Queen's Bench Division upon a special case raising questions for decision under the Highways Acts.

[FRY, L.J. That was a special case stated without pleadings after the issue of a writ, and the case was only a step towards the judgment, which was to be entered according to the decision of the Court.]

Under s. 29 of the Local Government Act, the same proceedings may be gone through as though a writ had been issued. The Court can hear the parties and take evidence. If the decision of the Court is not equivalent to a judgment or order, and is not enforceable, the whole procedure seems useless.

Cur. adv. vult.

April 29. FRY, L.J., read the following written judgment of the Court (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.), prepared by

LORD HALSBURY, L.C. The only thing with which we have to deal is whether in the form in which the question now arises before us there is an appeal to this Court. We are of opinion that there is not. An appeal must be given, and is not to be presumed. We do not of course mean that it must be given in so many words. If the thing appealed from becomes a judgment

(1) 13 Q. B. D. 497; 15 Q. B. D. 20.

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or order, a decree or rule of the High Court, it would of course be appealable under s. 19 of the Act of 1873, and perhaps something which may fill the character of a judgment or order, decree or rule, although not known by those names, may be subject to appeal as being practically within the words by which a right of appeal is given, although the words themselves be not used.

Now, the language of s. 29 of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe presently), is to be "decided" by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject-matter dealt with in the section, they certainly imply no right of appeal. In the case of *Overseers of Walsall* v. *London and North-Western Ry. Co.* (1), though the Court of Appeal was divided on the subject of whether an appeal existed in that case or not, no doubt was (nor, indeed, we think could be) expressed, that if the proceeding then in question had been purely of a consultative character no appeal would lie; but for reasons partly depending upon the forms of the procedure, which involved a rule quashing an order of sessions, the House of Lords ultimately held that an appeal did lie. Now, in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words), there is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is "decision."

We think the legislature must be taken to have been aware of the state of the law, as pronounced by the House of Lords in 1878; and if those who framed the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out ten years before by the decision of the House of Lords in the case to which we have referred. But the legislature has not done so. It has used a popular, and not a technical or legal, word; and we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal.

And now, dealing with the subject-matter to which the question relates, we cannot doubt that the nature of the matter

(1) 4 App. Cas. 30.

referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative. In the first place, it is not necessarily a question that has arisen, but one which may be about to arise. It is to be a question of the transference of the "business, power, duty, or liability" from one set of authorities to another, and it appears to have been thought convenient, without any existing legislation justifying the intervention of a Court of justice, that the High Court of Justice might be consulted for their opinion as to which local authority was the proper authority for undertaking such "business, power, duty, or liability." We have used the words, "might be consulted," because, although the actual language is "submitted for decision," it is a question which might be "about to arise"; and can, therefore, only be decided in the sense of expressing the opinion of the Court how it ought be decided when it does arise. It is to be "without prejudice to any other mode of trying it," and it can only be submitted "on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned." So far as we can see, there is no obligation on the High Court to hear anybody who might be interested as a matter of fact in the decision of the question. And when one sees that the only parties to such a consultation are the authorities which may be charged with the administration of the "business, power, duty, or liability," it is to our minds clear that the legislature did not contemplate an actual determination of an existing dispute in which a private right was involved, and in which the owner of that private right would have all the ordinary rights of a citizen to maintain it in a Court of law, but was solely dealing with the question of which set of authorities should be charged with such and such portions of administration. The legislature sufficiently guarded private rights by saying that such an application to the High Court should be without prejudice to any other mode of trying it. They gave discretion to the Court to hear such parties as the Court itself should think just, and confining the decision, as we think they did, to the High Court of Justice, they appear to us to have carefully avoided the use of any language, or any forms of procedure which involve a right of appeal.

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For these reasons, we are of opinion that this Court has no jurisdiction to entertain the questions now raised on appeal, and that this application must be dismissed with costs.

Appeal dismissed.

Solicitors for County Council of Kent: *Palmer & Bull, for Brennan & Turner, Maidstone.*

Solicitors for council of the borough of Dover: *Sharpe, Parkers, Pritchard, & Sharpe, for Knocker, Dover.*

Solicitors for council of the borough of Sandwich: *Prior, Church, & Adams, for Baker, Sandwich.*

W. J. B.

April 14, 15.

JONES *v.* FOLEY.

Landlord and Tenant—Forcible Entry—Removing Roof of House—Injury to Furniture—Action of Trespass—Possession Warrant under 1 & 2 *Vict. c.* 74*—Effect of.*

The plaintiff, who was tenant to the defendant of a cottage, on the expiration of his tenancy wrongfully refused to give up possession. The defendant, who was desirous of rebuilding the cottage, sent some workmen to remove the roof. In the course of such removal, which was effected without any personal violence, certain tiles and other portions of the roof unavoidably fell on to the plaintiff's furniture in the room below and damaged it. In an action for trespass and injury to the furniture:—

Held, that the above facts disclosed no cause of action.

APPEAL from county court.

The plaintiff was tenant to the defendant, Lady Emily Foley, of a cottage down to June 24, 1890, when his tenancy expired; but, notwithstanding the expiration of his tenancy, he wrongfully refused to give up possession. The defendant, who was desirous of getting possession, with a view to pulling the cottage down and building a new one on its site, applied for, and obtained, on September 3, a warrant of justices, under 1 & 2 Vict. c. 74, directing the constables to give her possession of the cottage after the expiry of twenty-one days from that date. On the same day, September 3, but later in the day, some builder's workmen, acting under the instructions of the defendant, commenced the work of pulling the house down. By means of a ladder placed against the outside of the house they got on to the roof, and

removed a portion of the roof. On a subsequent day, also within the twenty-one days specified in the justices' warrant, they in the same manner removed a further portion of the roof. On both occasions certain tiles and pieces of mortar were unavoidably caused to fall into the bedroom below, whereby the plaintiff's furniture was damaged. On neither occasion was the work of removing the roof attended by any personal violence. The plaintiff having brought an action in the county court for trespass and injury to his furniture, the judge directed the jury that the issue of the justices' warrant entitled the plaintiff to retain the possession during the currency of the twenty-one days; but that, even if the plaintiff was not so entitled to retain the possession, if in their (the jury's) opinion the act of removing the root amounted to a taking of possession of the house by force by the defendant's workmen, such act was indictable as a forcible entry; and that for injury to the plaintiff's furniture resulting therefrom the defendant would be liable in damages. The verdict passed for the plaintiff. The defendant appealed.

R. H. Amphlett, for the defendant. The judge was wrong in not non-suiting the plaintiff. The defendant was entitled to the immediate possession. The issue of the justices' warrant could not have the effect of giving the plaintiff a fresh term for the period during which the execution of the warrant was suspended. The only object of the statute was to enable a landlord lawfully to use force for the purpose of regaining the possession of premises which cannot be regained without it. Then, if so, the plaintiff's claim fails; for the stripping off of the roof was not a forcible entry; and, even if it were, it would only be the subject of an indictment, not of an action for damages. [He was stopped.]

A. T. Lawrence, for the plaintiff. The issue of the possession warrant caused the plaintiff's possession to be protected by law during the twenty-one days. The defendant had a choice between two remedies—the common law remedy of entry, and the statutory remedy of recovering possession at the hands of the constables. By obtaining the warrant she elected the latter, and by that election was bound. Any damage done while the plaintiff's possession remained so protected was actionable. But apart from

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that, the injury to the furniture was an actionable wrong, for it was done in the course of the commission of a forcible entry. Any act which would amount to a breaking and entering for the purposes of an indictment for burglary amounts to a forcible entry within the meaning of the Statutes of Forcible Entry. And the case of *Beddall* v. *Maitland* (1) is a direct authority that for any independent wrong, such as an assault or injury to furniture, committed in the course of a forcible entry, damages can be recovered even by a person whose possession was wrongful.

DAY, J. I am of opinion that in this case the plaintiff is not entitled to retain his judgment, and that the appeal must be allowed. I have carefully considered the facts, and I fail to see that they disclose anything in the nature of a cause of action. It appears that the plaintiff, who was tenant to the defendant, Lady Emily Foley, upon the expiration of his term refused to give up possession of the premises. By such refusal, the defendant, who was desirous of pulling the cottage down and rebuilding another house on its site, was necessarily much embarrassed. She accordingly applied to the justices for a warrant directing the constables to give her possession. The justices issued their warrant, though its execution was in accordance with the terms of the statute necessarily suspended for twenty-one days. But the issue of that warrant did not in any way affect the rights of the parties; it neither extended the rights of the tenant, nor limited those of the lessor. Its only effect was to entitle the defendant after the expiry of the twenty-one days to forcibly enter upon the premises, which, apart from the warrant, she could not lawfully do. The defendant, however, did not wait to avail herself of the warrant; but, on the same day that it was issued, she sent the builder to commence the work of pulling the house down. In the course of the removal of the roof, portions of the roof unavoidably fell into the bedroom below, and damaged some of the furniture. But that did not give the plaintiff any cause of action. The defendant was perfectly justified in doing what she did. The plaintiff had no right whatever to be in the house; he was a trespasser. Any injury that happened

(1) 17 Ch. D. 174.

to his furniture was not due to any unlawful act of the defendant, but was the result of his own obstinacy in unlawfully insisting upon remaining where he was, and he must put up with the consequences. The defendant did not purposely damage the goods. The removal of the roof was effected not with the object of injuring the plaintiff, but simply as a step in the demolition of the defendant's own house. It was contended, indeed, on behalf of the plaintiff, that the act of the defendant here amounted to a forcible entry, and the case of *Beddall* v. *Maitland* (1) was relied on as an authority for the proposition that where the party who is entitled to possession enters forcibly, and in the course of the entry does damage to the property of the party who was in possession, an action will lie. The correctness of that proposition it is unnecessary here to consider, for I am clearly of opinion that what was done here did not amount to a forcible entry. It does not belong to the class of acts at which the statutes of forcible entry are aimed. The plaintiff has established no cause of action. The judgment must consequently be entered for the defendant.

LAWRANCE, J. I am of the same opinion. I do not think that the removal of the roof by the defendant was a forcible entry within the meaning of the statutes. As to the other point, it seems clear that the proceedings before the justices did not alter the position of the parties. The defendant was entitled to the immediate possession, and had a right at common law to resume possession at once provided she did not commit a forcible entry in so doing. The fact that she applied to the justices for the additional statutory remedy, exerciseable after a certain interval, of recovering the possession with the assistance of the constables by force if need be, could not take away her common law right.

Judgment for the defendant.

Solicitors for plaintiff: *Ford & Ford, for Tree, Worcester.*

Solicitors for defendant: *Wood, Bigg, & Nash, for Yonge & Cox, Worcester.*

(1) 17 Ch. D. 174.

J. F. C.

C. A.
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April 27.

[IN THE COURT OF APPEAL.]

SALAMAN *v.* WARNER AND OTHERS.

Practice—Appeal—Order whether Final or Interlocutory—Point of Law raised by Pleadings—Order dismissing Action—Order LVIII., *r.* 3—*Order* XXV., *rr.* 2, 3.

An order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial under Order XXV., rr. 2 and 3, is not a final order within Order LVIII., r. 3.

A "final order" is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation.

APPEAL from the order of the Divisional Court (Day and Lawrance, JJ.), upon a point of law raised on the pleadings under Order XXV., r. 2.

The facts were as follows. The defendants raised by their defence the point of law that the statement of claim did not disclose any cause of action. A judge at chambers ordered that the point should be set down for argument and disposed of before the trial. It accordingly came on before the Divisional Court, who after argument ordered under Order XXV., r. 3, that the action should be dismissed with costs. Thereupon the plaintiff gave a four days' notice of appeal as from an interlocutory order.

Sir E. Clarke, S.G., and *Cock, Q.C.* (*A. T. Lawrence*, with them), for the defendant Warner, took the preliminary objection that the notice of appeal should have been a fourteen days' notice, the order being a final order. This is a final decision of the rights of the parties, inasmuch as the action was dismissed with costs. [They cited Order LVIII., rr. 3, 15; *Trowell* v. *Shenton* (1); *Whistler* v. *Hancock* (2); *International Financial Society* v. *Moscow Gas Co.* (3)]

Sir R. E. Webster, A.G. (*C. F. Gill* and *F. M. Abrahams*, with him), and *Sir Charles Russell, Q.C.* (*H. Sutton*, with him), appeared for the other defendants.

(1) 8 Ch. D. 318. (2) 3 Q. B. D. 83.
(3) 7 Ch. D. 241.

Moulton, Q.C., and *T. Willes Chitty*, (*Finlay, Q.C.*, and *McKenna*, with them), for the plaintiff. An order is not final unless it is made upon an application or proceeding, the result of which, whichever way it is decided, will finally determine the litigation: *Standard Discount Co.* v. *La Grange.* (1) In this case, if the decision of the point of law had been the other way, the action must have gone on to trial. [They also cited *Collins* v. *Vestry of Paddington.* (2)]

Sir E. Clarke, S.G., in reply, cited *Hughes* v. *Little.* (3)

LORD ESHER, M.R. Taking into consideration all the consequences that would arise from deciding in one way and the other respectively, I think the better conclusion is that the definition which I gave in *Standard Discount Co.* v. *La Grange* (4) is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. That is the rule which I suggested in the case of *Standard Discount Co.* v. *La Grange* (5), and which on the whole I think to be the best rule for determining these questions; the rule which will be most easily understood and involves the fewest difficulties. As an example of the difficulties produced by the opposite view, take the case where an order is made staying or dismissing an action as frivolous and vexatious; if that is a final order, the period during which an appeal may be brought is a year. In this case the Divisional Court allowed what is really equivalent to a demurrer to the statement of claim, and, as long as that decision stands, it is no doubt final in one sense; but, if they had

(1) 3 C. P. D. 67.
(2) 5 Q. B. D. 368.
(3) 18 Q. B. D. 32.
(4) 3 C. P. D. 67. at p. 71.
(5) 3 C. P. D. 67.

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disallowed the point taken, then the action must have gone to trial. If in such a case the order were final, there would be a year to appeal in, and the case might have to go on after that lapse of time, when there might be increased difficulty in dealing with the matter in dispute from the death or disappearance of parties or witnesses. We think that the rule I have mentioned is the best to adopt, and, applying it to this case, the result is that the order appealed against is interlocutory, not final.

FRY, L.J. The 3rd and 15th rules of Order LVIII. have raised considerable difficulties because they use the term "interlocutory order," of which no definition is to be found in the rules themselves or, so far as I know, by reference to the earlier practice, either of the Common Law or Chancery Courts. These difficulties are well illustrated by various cases that have been decided. We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing. The intention appears to be to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined. Applying this test to the present case, it is obvious that the order here was made on an application of which the result would not in one event be final. Therefore this is an interlocutory order. I only make this further observation. I think the definition we are now adopting goes further than any other would do to harmonize the various cases on the subject.

LOPES, L.J. I am of the same opinion. I think the definition suggested by the Master of the Rolls in the case that has been referred to is the right definition for this purpose. I think that a judgment or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the

rights of the parties. The case of *In re Riddell* (1) appears to me to be in point. That was a decision under the bankruptcy rules in which the term "final judgment" is used. The Court held that an order dismissing an action for want of prosecution was not a final judgment.

Objection overruled.

Solicitors for plaintiffs: *McKenna & Co.*

Solicitors for defendant Warner: *Harris, Wilkinson, & Raikes.*

Solicitors for the other defendants: *Michael Abrahams, Sons, & Co.; Foss & Ledsam.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. *April* 25.

COMFORT *v.* BETTS.

Assignment of Debt—Right of Assignee to Sue—Trust in respect of Moneys Recovered—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

An assignment of a debt or legal chose in action may be absolute within the Judicature Act, 1873, s. 25, sub-s. 6, although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignor.

A deed was executed by creditors of the defendant, by which, after recital of an agreement that their debts should be assigned to the plaintiff on the terms that he should proceed to recover the same, and pay to them respectively, out of the aggregate amount recovered, such proportionate part thereof as should represent the individual debt due to them respectively, or such part thereof as might have been recovered, it was witnessed that they assigned their respective debts to the plaintiff, to hold the same absolutely:—

Held, that such deed was an absolute assignment within sub-s. 6 of s. 25 of the Judicature Act, 1873.

APPLICATION to set aside verdict and judgment entered for the plaintiff at the trial before Pollock, B., with a jury, and to enter them for the defendant.

The facts were, so far as material, as follows. The plaintiff sued as assignee of debts to the total amount of 70*l.*, incurred by the defendant to various tradesmen, which had been assigned by them to the plaintiff. The assignment, which was by deed made between the persons and firms whose names appeared in the schedule, the assignors, and the plaintiff, the assignee, recited

(1) 20 Q. B. D. 512.

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that the assignors had agreed to assign, and the assignee had agreed to take an assignment of, the respective debts or sums comprised in the schedule, on the terms that the assignee should proceed to recover the same by action, or otherwise, and upon recovery thereof pay to the assignors respectively, out of the aggregate amount recovered, such proportionate part of such aggregate sum as should represent or comprise the individual debt due to them respectively, or such part thereof as might have been recovered by the assignee. It then witnessed that, in pursuance of the recited agreement, the assignors, each in respect of the debt or sum placed opposite his name or their name in the schedule, did assign the same debt or sum unto the assignee, to hold the same unto the assignee absolutely. The deed was signed by the several assignors. The schedule specified various debts all under 20*l*. The debts so assigned were due from the defendant, and notice of the assignment had been given to him; but the point was taken that there was no such assignment as came within sub-s. 6 of s. 25 of the Judicature Act, 1873, and therefore the plaintiff could not maintain the action. The learned judge overruled the contention, and verdict and judgment for the plaintiff were entered accordingly.

Horace Browne, for the defendant. By the terms of the Act there must be an absolute assignment, not purporting to be by way of charge only. An assignment by which debts are merely assigned for the purpose of collection and recovery to a person who is not to have any interest in them, is not such an assignment as is contemplated by the Act. No estate or benefit really passes to such an assignee. [He cited *National Provincial Bank* v. *Harle* (1); *Walker* v. *Bradford Old Bank, Limited*. (2)]

Morten, for the plaintiff. This assignment exactly comes within the terms of the Judicature Act. The assignment purports to be absolute, and it was clearly the intention of the parties to create such an assignment as would enable the plaintiff to sue in his own name. The fact that a trust may be constituted as to the proceeds of the action does not prevent the assignment from being absolute within the Act. [He cited

(1) 6 Q. B. D. 626. (2) 12 Q. B. D. 511.

Burlinson v. *Hall* (1); *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (2)]

Horace Browne, in reply. In *Burlinson* v. *Hall* (1), an interest in the debts assigned was conveyed to the plaintiff. [He cited Story's Equity Jurisprudence, ss. 1039, 1040 d.]

LORD ESHER, M.R. In this case the defendant owed debts to several tradesmen. They have respectively executed a deed which is in terms an absolute assignment by each of them of his respective debt to the plaintiff. It struck me at first that inconveniences might arise from the course here adopted. It appeared to me that, if an assignment could be made of a number of debts to a person for the mere purpose of enabling an action to be brought in the High Court in the name of the assignee on behalf of all the creditors for the aggregate amount of the debts, whereas before such assignment each debt must have been sued for separately in the county court by the creditor in his own name, it might perhaps occasion mischief, especially in university towns, by assisting people who give credit to young men, and are desirous of avoiding the necessity for suing in their own names. Again, it appeared to me that, if a new business of debt collecting in this manner became established, and large numbers of debts were assigned to debt collectors without their having any interest in such debts, and merely for the purpose of their being sued for, it might be that a considerable amount of business would be taken from the county courts, which might perhaps be considered by some an evil. It therefore seemed to me necessary to consider the case with some care. But after all we are bound by the terms of the Act of Parliament, and must determine this case in accordance with those terms. This document is in form an absolute assignment of each of these debts. It is clear that it was intended to be an absolute assignment of the debts, subject to a trust for payment of the money recovered to the creditors. The legal property in the debts was intended to pass, leaving only a trust; therefore there was an assignment which purported to be absolute, and which the parties intended to be so. Then, is there anything in the words of the sub-section which enables us

(1) 12 Q. B. D. 347. (2) 23 Q. B. D. 239.

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to say that such an assignment as this is not within it? I see nothing that enables us to limit the plain words of the Act. I cannot see that any absolute injustice can be done by giving its terms their ordinary meaning; and on further consideration I do not see that any very great inconvenience can arise. Under these circumstances I think that we are bound to give effect to the plain words of the Act, and to hold that this is a valid assignment of these debts within its terms; and, therefore, that it passed the legal property in them to the plaintiff. On these grounds I think that this application must be dismissed.

FRY, L.J. I am of the same opinion. The 6th sub-section of the 25th section of the Judicature Act, 1873, has enabled the owner of a legal debt or chose in action to assign his legal right to it. Such assignment must be effected by the means indicated by the section. First, there must be an absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of the debt or other legal chose in action. Secondly, there must be express notice in writing of such assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action; and from the date of that notice the legal right to such debt or chose in action is to pass and be transferred. The question is whether the instrument now in question is an absolute assignment, not purporting to be by way of charge only. The instrument clearly purports, and is intended in point of form, to be an absolute assignment, because the word "absolutely" is used in it: and, although it is true that a trust is constituted by it in respect of moneys recovered under it by the assignee, nevertheless the intention of the parties clearly is that it shall be absolute in the sense that the assignee shall have all the rights given by the 6th sub-section of the 25th section of the Judicature Act, 1873. Therefore, not only is the instrument an absolute assignment in point of form; but the intention of the parties is that it shall operate as such. I know of no legal or equitable objection to the owner of a legal chose in action converting someone else into the legal owner, and himself into equitable owner only, of such chose in action. Before this enactment this

question as to a legal chose in action could not have arisen; but there were other cases, which may serve as illustrations in point of principle, where the owner of a legal right or estate could without objection assign such legal right or estate to another, reserving to himself an equitable interest only. For instance, there was no objection to the owner of a leasehold estate assigning it to trustees for himself. It was not uncommon, to resort to such an assignment of the legal estate instead of giving a power of attorney, because it precluded the difficult questions which might arise as to the death of the person giving such a power.

In cases, therefore, of a description corresponding to this, there was no objection before the Judicature Act to a similar transaction. It appears to me, as I have said, that the plain intention of the parties was that the instrument should operate both in form and substance as an absolute assignment of the legal property in the debts, subject to a trust in respect of the moneys recovered; and I know no reason why it should not have effect accordingly. I am conscious that we may be opening the door to a new course of business; but whether that may be advantageous or not, I do not think it is for us to inquire. There may be conveniences and inconveniences on both sides. In the present case I am not sure that it may not be more advantageous for the debtor to be defendant in one action in the High Court than defendant in twenty-five actions in the county court. It is however, as it appears to me, not material to consider whether that is so or not.

LOPES, L.J. The question is whether this instrument is an absolute assignment within the meaning of sub-s. 6 of s. 25 of the Judicature Act, 1873. I am of opinion that it is. It is in point of form such an assignment, and I think that beyond all doubt it passes the legal right to these debts to the assignee. I was impressed at first with the suggestion that inconveniences might arise, if such a transaction as this were valid, especially with regard to the universities. On consideration, however, I am not clear that there is much in that suggestion. I am inclined to think that the defendant here is in a better position than if

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he were sued in several actions by the different creditors. I therefore agree that the application should be dismissed.

Application dismissed.

Solicitors for plaintiff: *Cheese & Green.*
Solicitor for defendant: *J. A. Hales.*

E. L.

C. A.

April 8.

[IN THE COURT OF APPEAL.]

SMITH, HILL & CO. *v.* PYMAN, BELL & CO.

Ship—Charterparty—Advance Freight to be paid "if required"—Requirement first made after Loss of Cargo—Liability of Charterer.

A cargo was shipped under a charterparty which contained the following clause: "One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." Shortly after the commencement of the voyage the vessel was wrecked and the cargo lost. Subsequently to the loss, and not before, the shipowner required payment of advance freight under the above clause:—

Held, that the requirement by the shipowner was a condition precedent to the liability of the charterer to pay advance freight; that the requirement was made too late, and that the charterer was not liable.

APPEAL from the judgment of Charles, J., on further consideration, in favour of the plaintiffs.

The facts and arguments appear fully in the report of the case in the Queen's Bench Division. (1)

Lawson Walton, Q.C., and *Robson*, for the defendants.
Cyril Dodd, Q.C., and *Montague Lush*, for the plaintiffs.

LORD COLERIDGE, C.J. I am of opinion that this appeal must be allowed. The contract is peculiar and stands entirely by itself, and in my judgment our decision must turn wholly upon the construction which we place upon its language; anything which I may say leaves untouched the law as laid down in *Kirchner* v. *Venus* (2) and *Allison* v. *Bristol Marine Insurance Co.* (3), and I base my decision upon the simple ground that this is a contract containing words to which effect must be given and

(1) Ante, p. 42.
(2) 12 Moo. P. C. 361.
(3) 1 App. Cas. 209.

which are different from the language of the contracts in those cases. It is clear that advance freight is for certain purposes to be treated as freight, and that it is not recoverable from the shipowner if actually paid to him; and in this contract the whole of the provisions as to advance freight are contained in one short clause, "one-third freight, if required, to be advanced, less 3 per cent., for interest and insurance." I think, as was pointed out by the Master of the Rolls during the argument, that the concluding words of this clause shew the reason why there was to be a "requirement" by the shipowner of the payment of advance freight: it was to enable the charterer to insure the advance freight which he was paying over to the shipowner, and which would of course be at the charterer's risk. In other words, one-third of the freight is to be advanced to the shipowner to cover disbursements, less 3 per cent. of that third to provide for interest on that payment in advance, and also for the cost of insurance. If that is the correct meaning, it follows that the requiring payment of the advance freight is a condition precedent to the obligation to pay it. I will not say what other meaning may be placed on the words "if required"; but it is plain that there must be some demand, of what nature it is immaterial for us in this case to consider. It is a demand for payment of a part of the freight which, if paid, the charterer must insure in order to protect himself; but here there was no demand until it was too late for the charterers to insure the advance freight if they paid it. The demand was not made by the shipowners at a time when it was enforceable, and under these circumstances there was no duty upon the charterers to pay. The contract seems to me to have been framed for the very purpose of preventing any extension of the doctrine of English law as to advanced freight, and I think that the learned judge at the trial proceeded upon a misapprehension of the effect of Lord Kingsdown's judgment in *Kirchner* v. *Venus*. (1)

LORD ESHER, M.R. I am of the same opinion. By the charterparty the charterers had to pay freight on the unloading and right delivery of the cargo at Odessa. If the ship had never

(1) 12 Moo. P. C. 361.

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arrived, or the cargo had never been delivered, no freight would have been payable at all. But there is a stipulation in the charterparty that part of that freight may be payable in advance: in other words, the advance freight is part of the freight. Now there are two peculiarities of the English law as regards freight; first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the shipowner; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting, and even if not paid can be recovered by the shipowner from the charterer upon the loss of the ship. These rules of law are in favour of the shipowner, and they are well-known rules; and the parties in the present case, knowing the law, have not left out of the charterparty the clause relating to advance freight as it appears in its ordinary form, but have altered it. The alteration they have made is in favour of the charterer, and in effect provides, that though there is to be advance freight, it is not to be due at the moment of starting, but only if and when the shipowner requires it. To say otherwise would be to strike the words "if required" out of the charterparty altogether, and make them mere surplusage; but giving the only reasonable interpretation I can to them, it seems that they are inserted for the protection of the charterer, and the words which follow shew that they were inserted for a particular reason. The words "if required" amount to a stipulation by which the requirement on the part of the shipowner is made a condition precedent to the charterer's liability to pay advance freight at all; if there were no such words the charterer would become liable for advance freight at once upon shipment of the cargo; these words are a stipulation that his liability shall not arise then, but only if the shipowner requires payment; this the shipowner is of course not bound to do; but if he does so, the charterer becomes liable.

It may easily be seen to what extent this stipulation is in the charterer's favour. Until he becomes liable to pay the advance freight, he has no insurable interest in it; he has no insurable

interest in any freight except that which he is actually liable to pay. The remaining words of the clause, "less 3 per cent. for interest and insurance," make clear the reason for the stipulation. When we once understand that the charterer is not liable to pay advance freight until requirement, and that he cannot insure it unless he is liable to pay it, it follows that, in order to carry out the obvious intention of the parties, the requirement must be made at a time when the charterer can insure; otherwise there would be no use in leaving money in his hands for the purpose of effecting an insurance when he cannot insure, having no insurable interest. The argument on behalf of the plaintiffs makes a loss by the charterer where the vessel or cargo is lost absolutely inevitable, and is certainly not one to which I should be disposed to give effect if it could be avoided. The requirement by the shipowner may be made at any time before the loss, but not afterwards; for then there would be no possibility of the state of circumstances arising which was stipulated for in the charterparty in favour of the charterer; in other words, he could never have an opportunity of insuring the advance freight. I am clearly of opinion that the defendants never became liable to pay advance freight at all. The learned judge at the trial laid too much stress on the literal meaning of the language of Lord Kingsdown in *Kirchner* v. *Venus* (1), and understood it in a sense which it was not intended to bear, as seems clear on a consideration of the judgments in the House of Lords in *Allison* v. *Bristol Marine Insurance Co.* (2)

FRY, L.J. I am of the same opinion. The charterparty provides that freight is to be payable on unloading and right delivery of the cargo at Odessa, with a stipulation that one-third, if required, is to be advanced, less 3 per cent. for interest and insurance. In my opinion, the last clause creates an option in the shipowner as to the time of payment of advance freight. Primâ facie such an option can only exist where the money is actually payable or may become so. An option as to the time of payment of money which cannot become payable is inconsistent in terms. But it is said that the rule of English law,

(1) 12 Moo. P. C. 361. (2) 1 App. Cas. 209.

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that advance freight, if paid, is not recoverable from the shipowner though there has been a total loss, governs the matter, and that a vested right in the shipowner to the payment of advance freight cannot be defeated. But that rule has, in my judgment, nothing to do with this option, and has nothing to do with this case.

There are other considerations which confirm this view. In the first place, it is obvious that a payment of advance freight is a payment on account of freight. How then can there be a payment on account of a sum which, under circumstances such as those in the present case, can never become payable? The answer is simple: there never can be. Again, from the amount of the advance freight, 3 per cent. is to be deducted, and the purpose of that deduction is twofold: it is for interest and insurance. What is the "interest" mentioned? It is a compensation to the payer, that is the charterer, for paying earlier than under the terms of the charterparty he would be required to pay; but when the ship or cargo is lost, he could never be required to pay at all, and therefore in such a case the provision could never operate. So, too, as regards the insurance: the allowance is made to enable the charterer to insure himself against the contingency of the ship or cargo being lost and his being unable to recover back from the shipowner the sum which he has paid or is liable to pay as advance freight. But how can he effect an insurance in respect of money which will never become payable—which he can never have to pay? In my opinion, the language of this charterparty clearly gives the shipowner an option as to the time of the receiving a sum of money from the charterer for advance freight—an option which is only exercisable by him as long as there is a possibility that such sum of money may become payable.

Appeal allowed.

Solicitors for plaintiffs: *Pritchard & Sons, for Hearfield & Lambert, Hull.*

Solicitors for defendants: *Maples, Teesdale & Co., for Lietch, Dodd, Bramwell, & Bell, Newcastle-upon-Tyne.*

W. J. B.

Applied. R. *v.* BARNETT. [1951] 1 All E.R. 917.

THE QUEEN *v.* HALL. 1891 *Feb.* 13, 19.

Criminal Law—Indictment—Parliament—Registration—Duties of Overseer—Misconduct—Indictable Misdemeanour—Parliamentary Registration Act, 1843 (6 & 7 *Vict. c.* 18), *s.* 51.

An offence by an overseer, within the meaning of s. 51 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), is not an indictable misdemeanour.

MOTION before Charles, J., to quash an indictment charging John Hall, an overseer of the poor for the parish of St. Mary Whitechapel in the county of London with misdemeanour.

The indictment was in seventeen counts. The first count alleged that on July 25, 1890, the accused was employed and acting in an office of public trust, to wit, as such overseer, that on such day and year it was his duty, as such overseer, in pursuance of the statutes and order in council then and there in force relating to the registration of parliamentary and county electors, to prepare a true and accurate alphabetical list of all persons qualified to vote as parliamentary and county electors in the parliamentary borough of Whitechapel, in the said county; that on such day and year one Stanley Mockett was qualified by law to vote as a parliamentary elector for the said borough, in respect of his occupation of certain premises situate in the said parish, and known as No. 41, Half Moon Passage, Whitechapel; that the accused well knew Stanley Mockett to be so qualified; and that on such day and year the accused, being then, as such overseer as aforesaid, in pursuance of his duties aforesaid, engaged in preparing the alphabetical list aforesaid, unlawfully, wilfully, maliciously, knowingly, and corruptly, did omit from the said list the name of the said Stanley Mockett, although he well knew that the said Stanley Mockett was then qualified as aforesaid as a parliamentary elector, and entitled to have his name put upon the said alphabetical list so being prepared aforesaid, contrary to the duty of the accused in his said public office, and against the statutes in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The second count alleged that before and until July 25, 1890,

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the accused was registration agent for a political association; that in September, 1889, the accused, as such agent, attended the Court of the revising barrister for the said borough and parish, and as such agent objected to the name of the said Stanley Mockett being inserted on the register, and that the said revising barrister overruled the said objection; that on July 25, 1890, the accused was acting, and it was his duty, as in the first count alleged; that on such day and year the said Stanley Mockett was duly qualified as the accused well knew, and that on such day and year the accused, being at the same time such overseer and such registration agent as aforesaid, and well knowing all the facts in this count hereinbefore set forth, did unlawfully, corruptly, arbitrarily, oppressively, and partially, and in contravention of his public duty, as such overseer as aforesaid, and in furtherance of his interests, as such registration agent as aforesaid, wilfully omit from the said alphabetical list the name of the said Stanley Mockett, being a duly qualified elector as aforesaid, contrary to the statutes, &c., and against the peace, &c.

The next thirteen counts alleged other breaches by the accused of his statutory duty as an overseer in reference to the preparation of such list, by wilfully inserting the names of persons known by him to be dead or to be aliens who had not been naturalized as British subjects, and by wilfully omitting the names of persons known by him to be qualified. The sixteenth count charged the accused with having on July 25, 1890, wilfully falsified such list, "contriving and intending to mislead and deceive the revising barrister who should be appointed to hold the revision court, and to lay false evidence before him as to the persons entitled to be upon the register, and to prevent the due course of law and justice in the preparation of such electoral register," and the seventeenth count with having on such day and year wilfully falsified such list "with intent to defeat and pervert the due course of any election of a member to serve in Parliament for such borough, which should be holden between the last day of November, 1890, and the first day of December, 1891, and with intent to pervert and obstruct the due course of law and justice in any proceedings which should be taken in

any court of record wherein it should be material to determine who should be the persons entitled to vote for the election of such member."

Asquith, Q.C., and *Arnold White*, in support of the motion. The misconduct with which the defendant is charged does not constitute an indictable offence. The duty of preparing lists of parliamentary voters was first imposed on overseers by ss. 37–57 of the Reform Act, 1832. (1) No such duty existed at common

(1) By the Reform Act, 1832 (2 Will. 4, c. 45), s. 76: "And be it enacted, That if any sheriff, returning officer, barrister, overseer, or any person whatsoever shall wilfully contravene or disobey the provisions of this Act or any of them with respect to any matter or thing which such sheriff, returning officer, barrister, overseer, or other person is hereby required to do, he shall for such his offence be liable to be sued in an action of debt in any of His Majesty's Courts of Record at Westminster for the penal sum of five hundred pounds, and the jury before whom such action shall be tried may find their verdict for the full sum of five hundred pounds, or for any less sum which the said jury shall think it just that he should pay for such his offence; and the defendant in such action, being convicted, shall pay such penal sum so awarded, with full costs of suit, to the party who may sue for the same: Provided always, that no such action shall be brought except by a person being an elector or claiming to be an elector, or a candidate, or a member actually returned, or other party aggrieved: Provided also, that the remedy hereby given against the returning officer shall not be construed to supersede any remedy or action against him according to the law now in force."

By the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), s. 1: "The clauses and provisions of the said Act (i.e. ss. 37 to 57 of the Reform Act, 1832), so enacted for the purpose of forming a register of all persons entitled to vote in the election of a knight or knights of the shire to serve in Parliament for any county, or for the riding parts or divisions of any county, and for the purpose of forming a register of all persons entitled to vote in the election of a member or members to serve in Parliament for any city or borough in England and Wales, and for the defraying of the expenses to be incurred thereby, and for the appointment and payment of revising barristers, shall be and the same are hereby repealed, except as to any register heretofore made."

By s. 2: "And be it enacted, that this Act shall come into force on the first day of June next, and shall thenceforth be taken to be part of the said Act as fully as if it were incorporated therewith."

By s. 51: "And be it enacted, That any overseer of any parish or township who shall wilfully refuse or neglect to make out any list, or who shall wilfully neglect to insert therein the name of any person who shall have given due notice of claim, or who in making out the list of voters for any city or borough shall wilfully and without any reasonable cause omit the name of any person duly qualified

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law. These sections were repealed by the Parliamentary Registration Act, 1843, and the duties and liabilities of overseers in respect of the preparation of parliamentary borough lists are now defined by ss. 13–19, 51 and 97 of that Act, and s. 29 of the Parliamentary and Municipal Registration Act, 1878. The 51st section of the Parliamentary Registration Act, 1843, renders

to be inserted in such list, or who shall wilfully and without reasonable cause insert in such list the name of any person not duly qualified, or who shall wilfully refuse or neglect to publish any notice or list, or copy of the part of the register of voters relating to his parish or township, at the time and in the manner required by this Act, or who shall wilfully refuse or neglect to deliver to the clerk of the peace the copy of the lists of claimants and of persons objected to, and the copies of the register as required by this Act, or who shall wilfully refuse or neglect to deliver to the town clerk of the city or borough the copies of the several lists as required by this Act, or who shall wilfully refuse or neglect to attend the Court for revising the lists of voters of his parish or township, or to attend any revising barrister when required by any summons as aforesaid, or who shall wilfully refuse or neglect to deliver to the barrister or barristers holding any such Court, the several lists to be made out by them as aforesaid, or who shall be wilfully guilty of any other breach of duty in the execution of this Act, shall for every such offence be liable to pay by way of fine a sum of money not exceeding five pounds nor less than twenty shillings, to be imposed by and at the discretion of any barrister holding any Court for the revision of any list of the parish or township of such overseer: Provided always, that nothing herein contained as to any fine as aforesaid shall affect or abridge any right of action against any overseer or other person liable to any fine as aforesaid, or any liability such overseer or other person may incur under or by virtue of this Act or the said recited Act."

By s. 97: "And be it enacted, that every sheriff, under-sheriff, clerk of the peace, town clerk, secondary, returning officer, clerk of the Crown, postmaster, overseer, or other person or public officer, required by this Act to do any matter or thing, shall for every wilful misfeasance, or wilful act of commission or omission contrary to this Act, forfeit to any party aggrieved the penal sum of one hundred pounds, or such less sum as the jury before whom may be tried any action to be brought for the recovery of the beforementioned sum shall consider just to be paid to such party, to be recovered by such party, with full costs of suit, by action for debt in any of Her Majesty's Superior Courts in Westminster: Provided always that nothing herein contained shall be construed to supersede any remedy or action against any returning officer according to any law now in force."

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 29: "The provisions of the 51st section of the Parliamentary Registration Act, 1843, relating to the power of the revising barrister to fine overseers for neglect of duty, shall extend to every wilful refusal, neglect, or breach of duty on the parts of overseers in the execution of this Act."

them liable to be fined by the revising barrister for any wilful breach of duty, and provides that this remedy is not to affect the right of action for a penalty given by s. 97 to persons aggrieved by their misconduct. The legislature evidently considered this double liability sufficient to enforce the proper performance of their duties. The question depends upon the construction of the statute, and the rule which is applicable is stated in the note to 2 Hawkins' Pleas of the Crown, c. 25, s. 4, in which *Rex* v. *Wright* (1) is cited. The rule was discussed before Lord Mansfield in that case, and in *Rex* v. *Boyall* (2), and later in the cases of *Reg.* v. *Gregory* (3), *Reg.* v. *Buchanan* (4), and *Couch* v. *Steel* (5). The law appears to be that, where a statute renders acts punishable for the first time, if, as is here the case, the statute contains no general prohibition, the acts are not punishable by indictment, but only in the manner which the statute prescribes. From the time of the passing of the Reform Act, 1832, to the present day there has been no instance of a similar indictment of an overseer; and, had it been intended to render breaches of the multifarious duties of these officials under the Registration Acts so punishable, there would have been a specific enactment to that effect, as is the case in the Sheriffs Act, 1887, s. 29, and the Coroners Act, 1887, s. 8, sub-s. 2.

C. W. Mathews, (with him *C. F. Gill*), for the prosecution. The indictment is good. The breaches of duty alleged in the first fifteen counts would have been indictable under the Reform Act, 1832. The sections of that Act which imposed the new obligations made no provision for the punishment of disobedience, and there must, therefore, have been a remedy by indictment. This appears from the statement in 2 Hawkins' Pleas of the Crown, c. 25, s. 4, which is supported by *Rex* v. *Jones* (6), and *Reg.* v. *Price* (7). The Registration Act, 1843, does not in terms take away this remedy, and the specific provisions of s. 51 with respect to punishment by fine ought not to be construed as excluding it. It is immaterial that ss. 13 to 19 of the Act are

(1) 1 Burr. 543.
(2) 2 Burr. 832.
(3) 5 B. & Ad. 555.
(4) 8 Q. B. 883.
(5) 3 E. & B. 502.
(6) 2 Str. 1145.
(7) 11 Ad. & E. 727.

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mandatory rather than prohibitory, and the effect of the decisions is, it is submitted, to shew that the remedy created by s. 51 is cumulative or alternative only, and that the remedy by indictment is still available: *Rex* v. *Davis* (1); *Rex* v. *Wright* (2); *Rex* v. *Boyall* (3); *Rex* v. *Harris* (4); *Rex* v. *Robinson* (5); *Reg.* v. *Buchanan* (6). It is to be remembered that an overseer cannot be fined under s. 51 for any breach of duty discovered after the revising barrister is functus officio.

The 16th and 17th counts are, it is contended supported by the decision in *Reg.* v. *Vreones.* (7)

Asquith, in reply.

Cur. adv. vult.

1891. Feb. 19. CHARLES, J. The defendant is charged in the seventeen counts of this indictment with crimes which may be classified into three divisions. First, he is charged with the wilful omission of the names of qualified persons from the electoral lists. Secondly, he is charged with the wilful insertion of the names of unqualified persons in the electoral lists. These charges are made against him as an overseer of the poor, and, it is contended, are breaches of the duty imposed upon him as such by the Parliamentary Registration Act of 1843 (6 Vict. c. 18). The first fifteen counts of the indictment are concerned with these two classes of charges, but it is needless for me to go through them in detail; one and all, they charge wilful and deliberate contravention of the defendant's statutory duty. Thirdly, in the sixteenth and seventeenth counts the defendant is charged with an attempt to prevent the course of justice, by taking steps to place false evidence before the revising barrister, who is in a certain sense a judicial tribunal. The counts vary in form. In the sixteenth the defendant is charged with tampering with the lists of voters, in the seventeenth with tampering with the register itself, which, when published, is evidence of the right to vote of the persons whose names are on it. A motion was made to quash the indictment, on the ground that it did not disclose any indict-

(1) Sayer, 163.
(2) 1 Burr. 543.
(3) 2 Burr. 832.
(4) 4 T. R. 202.
(5) 2 Burr. 800.
(6) 8 Q. B. 883.
(7) [1891] 1 Q. B. 360.

able offence, and that no indictment would lie, because the offence charged was a statutory offence, for which the statute which imposed the duty prescribed a particular remedy. After hearing an able argument on both sides, I took time to consider my decision.

Before referring to the statutes it is desirable that I should state the principle which should govern a case of this description, and it is nowhere given better, I think, than in Hawkins' Pleas of the Crown, Bk. 2, c. 25, s. 4. The passage is as follows: "It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for this contempt of the statute, *unless such method of proceeding do manifestly appear to be excluded by it.* Yet, if the party offending have been fined to the king in the action brought by the party, as it is said that he may in every action for doing a thing prohibited by statute, it seems questionable whether he may be afterwards indicted, because that would be to make him liable to a second fine for the same offence. . . Also where a statute makes a new offence which was no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems impliedly to exclude that of indictment. Yet it hath been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of indictment. Also where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. And if the indictment for such offence conclude contra formam statuti, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law."

This is a full statement of the principle which must guide me

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as regards the decision of this case. The inquiry to which I have to address myself is—first, whether the offence charged is a statutory offence simply; secondly, whether, if it be so, the statute creating the offence has prescribed a particular remedy in such terms as to exclude either expressly or by implication the remedy by indictment.

Upon the first point I do not think there can be any room for controversy. All the offences charged against the defendant are wilful violations of duties imposed upon overseers, not by the common law, but by the Registration Act of 1843 and the amending statutes, and they consist entirely of alleged breaches of duties created by those statutes, and, in particular, of alleged breaches of duties created by the 13th and the following sections of the Registration Act of 1843. With reference to these duties, s. 51 of that Act provides "that any overseer who shall wilfully refuse or neglect to make out any list, or who shall wilfully neglect to insert therein the name of any person who shall have given due notice of claim, or who, in making out the list of voters for any city or borough, shall wilfully and without any reasonable cause, omit the name of any person duly qualified to be inserted in such list, or shall wilfully and without any reasonable cause insert in such list the name of any person not duly qualified . . . or who shall be wilfully guilty of any other breach of duty in the execution of this Act, shall for every such offence be liable to a penalty by way of fine of a sum of money not exceeding five pounds, nor less than twenty shillings, to be imposed by and at the discretion of any barrister holding any court for the revision of any list of the parish or township of such overseer: Provided always, that nothing herein contained as to any fine as aforesaid shall affect or abridge any right of action against any overseer or other person liable to any fine as aforesaid, or any liability, such overseer or other party may incur under or by virtue of this Act and the said recited Act." This is the section which deals with offences against this statute, and it is to be observed that the penalty prescribed is imposed for every breach of duty: for, after enumerating a number of specific breaches of duty, the section adds, "or who shall be wilfully guilty of any other breach of duty in the execution of this Act."

Having referred to that section, which creates the offence of a wilful neglect of duty, it is necessary that I should allude to the earlier part of the statute, which imposes the various duties in connection with the electoral lists upon the overseer. But before I do so, and in order to appreciate some arguments that were addressed to me on the part of the prosecution, I may shortly refer to the position of an overseer under the Reform Act of 1832. That Act, for the first time, cast upon overseers duties in connection with the register of voters. By it provision was made for the preparation of a general register of electors in towns and counties, and the duty of preparing the register was laid upon the overseers. They were to prepare the lists; they were to publish the lists; they had to prepare a list of the names of the persons who were objected to; and they had to forward all the lists to the clerk of the peace in the case of the county, and to the town clerk in the case of a borough. Those officials had afterwards to forward them to the revising barrister, whose appointment was provided for by the same statute. The sections which particularise these various duties are ss. 37 to 57. Those sections were repealed by the Registration Act of 1843, which, after mentioning the Reform Act of 1832, enacted that "the clauses and provisions of the said Act for the purpose of forming a register, &c., should be and are repealed"; and then by s. 2 enacted, "that this Act is to be taken to be part of the said Act as fully as if it were incorporated therewith." There is, however, a section of the Reform Act of 1832 which is not repealed. Although I am not quite clear as to the effect which subsequent legislation has had upon these sections, it is sufficient for my present purpose to state that the 76th section of the Reform Act of 1832 is not repealed. This section provides "that if any sheriff, returning officer, barrister, overseer, or any person whatsoever, shall wilfully contravene or disobey the provisions of this Act, or any of them, with respect to any matter or thing which such sheriff, returning officer, barrister, overseer, or other person is hereby required to do, he shall for such his offence be liable to be sued in an action of debt in any of His Majesty's Courts of Record at Westminster for the penal sum of 500*l.*, and the jury before whom such action shall be tried may find their verdict for

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the full sum of 500*l.*, or for any less sum which the said jury shall think it just that he should pay for such his offence, and the defendant in such action being convicted shall pay such penal sum so awarded, with full costs of suit, to the party who may sue for the same: Provided always that no such action shall be brought except by a person being an elector, or claiming to be an elector, or a candidate, or a member actually returned, or other party aggrieved: Provided also, that the remedy hereby given against the returning officer shall not be construed to supersede any remedy or action against him according to the law now in force."

My attention was drawn by the learned counsel for the prosecution to the position of overseers during the eleven years between 1832 and 1843. He said that the Reform Act laid duties upon them, and that for the breach of these duties they were indictable. I think that if there had been no 76th section in the Reform Act, this contention would have been sound; for the case would have fallen within the principle, that where a duty is created by statute, and no remedy is prescribed but by indictment, a person guilty of a breach of the duty is indictable. But the 76th section gives an express and particular remedy to any elector, candidate, member of parliament, or other party aggrieved, by providing that he may bring an action against any overseer who is guilty of wilful breach of duty, and that a jury may award him any sum they think fit up to 500*l.* If I had to decide the point, I should hold that as during those eleven years any overseer who had been guilty of any breach of duty would have been liable to conviction under the 76th section, the case was one in which a specific and particular remedy was given by the Act which imposed the duty, and that therefore the overseers were not indictable. It is a matter, as was said by the learned counsel for the defendant, of construction, and I cannot read the 76th section, especially having regard to the proviso which reserves remedies against the returning officer, without coming to the conclusion that during those eleven years an overseer would not have been indictable.

Assuming, however, that I am mistaken in this conclusion, and that the duties imposed on overseers by the Reform Act of

1832 were matter of indictment, this ingenious argument was presented to me. It was said that in that case the Registration Act of 1843 created no new duty to be performed by overseers, but simply prolonged the duty which they had to perform under the Reform Act of 1832; and that, therefore, inasmuch as the duty was imposed by the Registration Act of 1843, in unqualified terms, and the penal section which I have read was in a later part of the statute, the principle applied that the overseer was indictable for the breach of the duty imposed by the earlier part of the statute, because it was not a new duty, but a duty already cast upon his class; and that the position of the defendant was, therefore, similar to that referred to by Hawkins of a man guilty of an offence, apart from the statute under which he is indicted, in which case the special remedy provided by the statute is to be regarded as cumulative or alternative. I cannot, however, accede to this argument, for this reason. The first section of the Registration Act of 1843 repeals all the registration sections of the Reform Act. The duty, therefore, which is created by the 13th and subsequent sections of the Registration Act of 1843, is, in point of fact, a new duty and a duty created by that statute. It may be true that it was re-created; but still it was a fresh statutory creation. I do not think this makes much difference, because, as I have said, in my opinion an overseer would not have been indictable under the Reform Act; but even assuming that he would have been indictable under that act, inasmuch as the sections relating to his duties were all repealed by the 1st section of the Registration Act of 1843, I regard the duties, with the wilful disregard of which the defendant is charged, as imposed on him by the Registration Act of 1843, and, in point of law, for the first time, because the Reform Act which had imposed on him duties not altogether the same, but similar, was so far repealed. These new duties are prescribed by the 13th and the following sections of the Registration Act of 1843, as amended by the later Registration Acts.

By the 10th section of the Registration Act of 1843 the town clerk is instructed to have a form of precept issued to the overseer, and that precept is now, by the effect of the

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Local Government Act, 1888, and a Registration Order issued by the Privy Council in 1889, to be in the form prescribed by that Order, which gives the overseers minute instructions as to what they are to do with reference to the preparation of the lists. The 13th section provides as follows: "The overseers of every such parish or township shall, on or before the last day of July in every year, make out, or cause to be made out, according to the form numbered, &c., an alphabetical list of all persons who may be entitled to vote in the election of a member or members to serve in Parliament for such city or borough, in respect of the occupation of premises of the clear yearly value of not less than 10*l.*, situate wholly or in part within such parish or township; and another alphabetical list, according to the form numbered, &c., of all other persons (except freemen) who may be entitled to vote in the election of such city or borough by virtue of any other right whatsoever; and in each of the said lists the Christian name and surname of every such person shall be written at full length, together with the place of his abode, and the nature of his qualification; and where any person shall be entitled to vote in respect of any property, then the name of the street, lane, and the number of the house (if any), or other description of the place where such property may be situate, shall be specified in the list; and the said overseers shall sign such lists, and shall forthwith cause a sufficient number of copies of each of the said lists to be written or printed, and shall publish copies of the said lists on or before the 1st day of August in such year, and shall likewise keep a copy of each of the said lists, to be perused by any person, without payment of any fee, at any time between the hours of ten of the clock in the forenoon and four of the clock in the afternoon of any day, except Sunday, during the first 14 days after such lists shall have been so published, and shall deliver copies thereof to all persons applying for the same on payment of a price for each copy after the rate of, &c." The 15th section provides that persons omitted from borough lists may give notice of claim, and that the overseers are to make out lists of the claimants. The 17th section provides that persons named in the lists may object to any other person as not being entitled to be put on the lists.

By the 18th section the overseers are to make out and publish lists of persons objected to, and lists of the claimants; and by the 19th section they are to deliver the lists of voters, and the lists of the claimants, and the lists of persons objected to, to the town clerk. The dates at which they are to do these various duties have all been altered by subsequent legislation, but the duties remain substantially the same. It would be waste of time to read at length the Registration Order of 1889, which instructs the overseers what to do. They are instructed to prepare lists of voters, lists of claimants, and lists of persons objected to, and—and this is very material with regard to the last two counts of the indictment—not to deliver them to the revising barrister, but to publish them, and after they have published them, and the lists have been published a specified time, to deliver the lists to the town clerk. These are the duties, then, which the overseers have to perform, duties created, or rather re-created, by the Registration Act of 1843.

The Registration Act of 1878, which made many alterations in the way in which the lists are to be prepared, provides by the 29th section that "the provisions of the 51st section of the Registration Act of 1843, relating to the power of the revising barrister to fine overseers for neglect of duty, shall extend to every wilful refusal, neglect, or breach of duty on the part of overseers in the execution of this Act."

So that the matter stands thus: By ss. 13 to 19 of the Registration Act, 1843, duties are imposed; by s. 51 offences are created, namely, a wilful breach of any of the duties imposed, and for those offences a specific penalty is enacted; but further, by s. 97, it is provided that "every sheriff, under sheriff, clerk of the peace, town clerk, secondary, returning officer, clerk of the Crown, postmaster, overseer, or other person, or public officer required by this Act to do any matter or thing, shall for every wilful misfeasance, or wilful act of commission, or omission contrary to this Act, forfeit to any party aggrieved the penal sum of 100*l.*, or such less sum as the jury before whom may be tried any action to be brought for the recovery of the before-mentioned sum shall consider just to be paid to such party, to be recovered by such party with full costs of suit by action for

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debt in any of Her Majesty's Superior Courts at Westminster; provided always that nothing herein contained shall be construed to supersede any remedy or action against any returning officer according to any law now in force."

Now, what is the true construction to be placed upon these sections, the sections which create the duty, the section which imposes the penalty for wilful neglect of the duty, by way of fine to be imposed by the revising barrister, and the section which gives power, in case of any wilful act of commission or omission by an overseer, to any party aggrieved, to bring an action against the overseer? I have come to the conclusion that this is a case in which the specific remedies provided by ss. 51 and 97 exclude the remedy by indictment which would otherwise undoubtedly exist. It is to be observed that a special tribunal is provided by the 51st section to punish, not specific isolated breaches of duty, such as non-attendance before the revising barrister, or non-deliverance of lists to the town clerk, but all wilful breaches of duty by an overseer; and that tribunal is invested with discretion to fine an overseer a sum not exceeding 5*l.*, and not less than 20*s.* It would, I think, be a strange construction of a statute which creates a special tribunal with power to fine an overseer a sum not exceeding 5*l.* for any breach of duty, to hold that the overseer was nevertheless liable to any amount of fine or imprisonment for the same breach of duty. I do not deny that upon public grounds it might be desirable that there should be a remedy by indictment, for overseers are invested by these Acts with authority which is capable of being much misused. But from 1843 to 1891 the researches of counsel have not discovered one instance of an overseer having been indicted. Bearing in mind how minute and multifarious are the duties imposed by these Acts on overseers, I think the legislature intended that the revising barrister, who would have the best opportunity of seeing whether an overseer had discharged his duties, should be the sole person to say whether or not he had been guilty of any breach of them, and whether he had rendered himself liable to any, and, if so, what fine. The creation of a special tribunal points, as it seems to me, to an intention on the part of the legislature that the special tribunal

should be the only tribunal. Mr. Mathews urged that the revising barrister is not a good tribunal, because he is the creature of an hour, and when he has signed the lists and delivered up his appointment to the Treasury his duties are at an end. That is true; but, on the other hand, the revising barrister is the person best qualified to judge whether or not a wilful breach of duty has been committed by an overseer; and as regards what was said about a breach of duty by an overseer not being discovered till the revising barrister has become functus officio, in the first place, it is not likely that this could occur. These lists are not secret documents. They are published to everybody, on the door of every church and chapel in the borough. If there were any case of deliberate omission or insertion, it would almost certainly be discovered before the revising barrister held his court. But if the case did occur, it is provided for by s. 97, which, to my mind, points strongly against any remedy by indictment, because it prescribes that the party aggrieved may bring an action to recover 100*l.* against the defaulting overseer.

This section contains a proviso similar to the proviso in the 76th section of the Reform Act: "Provided also that nothing herein contained shall be construed to supersede any remedy or action against any returning officer according to any law now in force." The 51st section has also a proviso: "That nothing herein contained as to any fine as aforesaid shall affect or abridge any right of action against any overseer or other person liable to any fine as aforesaid, or any liability such overseer or other person may incur under or by virtue of this Act, or the said recited Act." It was pointed out to me that the proviso in s. 97, reserving remedies against the returning officer, was a significant one, and appeared to indicate almost decisively that the only remedy against an overseer was that prescribed by the earlier part of the section. I think there was great force in that argument. Further, it was pointed out to me that no remedy by indictment is reserved by s. 51, but that the proviso appears to refer to rights of action and nothing else. Mr. Mathews, in answer, said that the word "liability" was there, as well as the word "action." But that seems to me to refer to something other than an indictment, and having

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regard to the fact that the 76th section of the "said recited Act," i.e., the Reform Act, is unrepealed, I think the word is amply satisfied by holding that it refers to the criminal liability expressly imposed by that section. On the grounds then that a special tribunal is created by s. 51, and that a penal action is given in the language of the proviso to s. 97, it seems to me that the remedies created by these sections are the only remedies enforceable against an overseer, and that this is one of those cases in which a statutory duty is imposed, but the method of proceeding for the breach of the duty by indictment is excluded by the statute.

It remains for me to consider whether there is anything in the authorities that have been cited which is adverse to this conclusion. Upon a careful consideration of them, I think that they do not contain anything adverse to this conclusion, but when fairly read support it.

The earliest in date of the cases relied on for the prosecution was *Rex* v. *Davis* (1) in 1754, which decided that an indictment will lie against an overseer for not receiving a pauper removed by an order of two justices of the peace. The Chief Justice, in giving his judgment, said: "It has been said that as the offence of an overseer of the poor in not receiving a pauper removed by an order of two justices of the peace is a new offence created by 3 & 4 Wm. & M. c. 11, an indictment will not lie, another remedy being given by that statute; namely, "that if any overseer of the poor shall refuse to receive a person removed by warrant of two justices of the peace from one county, city, or town corporate to another, he shall forfeit the sum of 5*l*. . . . We are of opinion that, as a power of removing a person likely to become chargeable to a parish is given to two justices of the peace by the 13 & 14 Charles 2, c. 12, the not receiving of a person removed by an order of two justices of the peace is an offence against that statute, and consequently an indictment will lie." Now, Mr. Mathews relied on this as shewing that an indictment would lie against the overseer, in spite of the specific remedies provided against him; but it is to be observed that the Court was of opinion that an offence had been committed

(1) Sayer, 163.

against an earlier unrepealed statute, and I, therefore, cannot apply this sentence to the present case, because, assuming an overseer to have been liable to be indicted under the Reform Act, the Reform Act was itself repealed by the Registration Act of 1843. The judgment proceeds: "If this were a new offence created by the 3 & 4 Wm & M. c. 11, yet an indictment will in our opinion lie, in case the removal was to a place within the jurisdiction of the justices by whom the order of removal was made, the remedy by the latter statute being only given where the removal was to a place out of their jurisdiction. It does not appear from the indictment in the present case that the removal was to a place out of the jurisdiction of the justices by whom the order was made; and if intendment were necessary, the Court would, in support of the verdict intend, that it was to a place within their jurisdiction." It appears to me to be quite obvious that the learned judges who decided that case were of opinion that if the specific remedy provided by the statute of William and Mary had been applicable at all, their decision must have been that the indictment was not maintainable, because they held that the indictment was only maintainable, assuming the offence to be a new one, because the specific remedy had no application to the facts proved against the defendant. The case would be analogous to the present, and might be relied on by the prosecution if s. 51 of this Registration Act had only applied to this and that particular breach of duty, and if the defendant stood charged with a breach of duty other than that mentioned in s. 51. But as I have pointed out, s. 51 applies to every possible breach of duty by an overseer. So that it seems to me that instead of the case of *Rex* v. *Davis* (1) supporting the contention of the prosecution, it supports the conclusion at which I have arrived.

The next case cited was *Rex* v. *Wright*. (2) This case decided, not for the first time, but in accordance with general principles which had been laid down long before, that an indictment will not lie upon an Act which creates a new offence and prescribes a particular remedy. Lord Mansfield there said: "I always took it that where new created offences are only prohibited by the

(1) Sayer, 163. (2) 1 Burr. 543.

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general prohibitory clause of an Act of Parliament, an indictment will lie; but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution: one upon the general prohibition, and the other upon the particular specific remedy." Now this language almost exactly covers this case. In one sense it may be said that there is a general prohibitory clause in this statute, because the clauses imposing the duty, may, I suppose, be held by implication to provide that the breach of that duty is an offence. But the statute contains no express general prohibition, and dealing with the question as a matter of construction, I find it impossible to hold that because s. 51 does not immediately in number succeed the clauses imposing the duty, I must therefore imply a general prohibitory clause in s. 13. If there were no s. 51 there might be some ground for saying that a general prohibitory clause ought to be implied on the principle that where no other remedy is provided an indictment will lie. But in s. 13 there is no general prohibition; the only prohibition is in s. 51. The language therefore, of Denison, J., is inapplicable. "Where," he says, "an offence is not so at common law, but made an offence by Act of Parliament, yet an indictment will lie where there is a substantive prohibitory clause in such Act of Parliament (although there be afterwards a particular provision and a particular remedy given), but it is otherwise where the Act is not prohibitory but only inflicts the forfeiture and specifies the remedy." The report proceeds: "Wilmot, J., also took it so." It seems to me clear that this case cannot be relied on by the prosecution for the reason given by Lord Mansfield, and because on the construction of the statute I cannot see any substantive prohibitory clause in it at all.

The next case relied on is *Rex* v. *Robinson* (1), in which it was held that an indictment lies for disobeying an order of sessions. Lord Mansfield there says: "The objection to this indictment is that the offence is not indictable, because the Act of Parliament has pointed out a particular punishment, and a specific method of recovering the penalty which it inflicts. The rule is certain

(1) 2 Burr. 800.

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'that where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful)'—that is not antecedently to the statute—'by a particular section, that particular method of proceeding must be pursued and no other.' And this is the resolution in *Castle's Case*. (1) But where the offence was antecedently punishable by a common law proceeding, and a statute provides a particular remedy by a summary proceeding; there either method may be pursued, and the prosecutor is at liberty either to proceed at common law or in the method prescribed by the statute, because there the sanction is cumulative, and does not exclude the common law punishment." I am bound by this statement of the law, and it is entirely consistent with my view of the present case. In order to render it applicable, the prosecution would have to satisfy me that, apart from the Registration Act of 1843, the offence which they seek to punish was antecedently punishable by a common law proceeding.

Another case was referred to, that of *Rex* v. *Boyall* (2), where it was held that an indictment lies (the head note stating "Indictment does *not* lie" is incorrect) for not performing statute labour on the highway. There Lord Mansfield said: "As to the third objection it was an offence indictable before the appointment of the summary remedy prescribed by the statute of 22 Charles 2. The case of *Rex* v. *Davis* (3) was of the same kind. Therefore, the summary jurisdiction is cumulative (although there is another remedy given), and does not exclude the common law remedy." All that this case decides is that, where there is a common law remedy by indictment prior to the statute which gives the new remedy, there the new remedy is cumulative on the old one, or alternative with it, and that either course may therefore be pursued.

Much reliance was placed on *Rex* v. *Harris* (4), and certainly that case requires careful examination. It was an indictment against a pilot for disobeying an Order in Council which had forbidden access to a ship called the *Stephen*, while she was performing quarantine.

(1) Cro. Jac. 643.
(2) 2 Burr. 832.
(3) Sayer, 163.
(4) 4 T. R. 202; 2 Leach, 549.

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The Order in Council was set forth in the indictment. Lord Kenyon, C.J., in giving judgment, said: "This indictment states that the King in Council made an order in pursuance of this Act, which the defendant violated; and, therefore, without adverting to the other clauses in this Act of Parliament, which are adapted to other offences, the question is whether or not the disobedience of an order thus made by the King in Council be not an offence at common law? And most unquestionably it is." This again is in exact accordance with the principle a statement of which I read at the commencement of my judgment. It was a case in which a man was indicted for disobeying an Act of Parliament, the Act of Parliament having prescribed no other remedy against him. There was indeed another section in the Act imposing a penalty, but that section applied to offences against the act committed by the commander of the ship and persons who belonged to the crew, and did not include the defendant who was a pilot; and Lord Kenyon obviously bases his judgment on this ground. It was suggested that this really was a case of an Act in which, in one section, there was a general enactment that a certain quarantine Order in Council must be obeyed, and in another section there was a particular remedy attached to disobedience of that order, and yet that it had been held that an indictment lay; but on an examination of the case nothing of the kind appears. It is plain from the judgment of Lord Kenyon, that he was of opinion that the language of the later section of the Act of Parliament did not apply to the pilot at all. So, again, Ashhurst, J., says: "It is a clear and established principle that, when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanour. Now, here the defendant has been guilty of a breach of the first section of this Act of Parliament, which expressly gave power to the King in Council to make orders relative to persons going on board ships liable to perform quarantine; for the indictment states that the King in Council made an order on this subject, which it was competent to him to make, and that the defendant disobeyed it. For this he is

clearly punishable as for a misdemeanour at common law. This renders it unnecessary to make any determination on the fifth section of the Act; but if it were necessary to consider it, I should think that it relates only to the officers and passengers who came on board the ship from the infected place, and not to persons going on board after her arrival here." Buller, J., agreed with Ashurst, J., that the defendant was not within the meaning of the fifth section.

That case, therefore, decided nothing new, but only reiterated the old principle that where an Act of Parliament creates an offence and prescribes no remedy for it, the offence is indictable at common law. The language of Ashurst, J., with regard to the creation of the offence by the Act of Parliament, and the annexing of a penalty to it by a separate and substantive clause is not necessary for the decision; but I may say that I do not dissent from the observation. The difficulty which here presents itself to the prosecution is that this is not a case of a new offence expressly created by one clause of a statute, and a penalty annexed to that offence by another clause. The 13th and the subsequent clauses of the Registration Act create not a new offence but a new duty, and I cannot imply a general substantive prohibition where an express remedy is provided by ss. 51 and 97. I was invited to do so on the authority of two cases—*Rex* v. *Jones* (1) and *Reg.* v. *Price*. (2) But *Rex* v. *Jones* (1) has no bearing on the present discussion. There it was held that an overseer of the poor was indictable because he would not take office. The astonishing argument was presented to the Court, that because a statute of Elizabeth imposed a penalty upon an overseer for neglect of duty after taking office, therefore he could not be indicted for refusing to take office. To state such an argument is to refute it. *Reg.* v. *Price* (2), when carefully examined, proves to be merely an illustration of the well-known principle that a man who disobeys an Act of Parliament which prescribes no other remedy, is liable to indictment for misdemeanour. There the defendant had failed to register the birth of his child. The Act of 6 & 7 Wm. 4, c. 86, provides that the father of a child, if requested by the registrar to do so, is

(1) 2 Str. 1145. (2) 11 A. & E. 727.

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bound to inform the registrar of the particulars of the birth. The father in this case refused to give the information, and the whole argument turned on whether the Act did or did not impose an unqualified obligation on the father; in other words, whether the statute was merely an empowering statute, or whether it was a statute which the father was bound to obey? The Court came to the conclusion that the statute was not an empowering statute merely, but that the words of the clause were imperative and unambiguous, and that therefore the father was indictable for having refused to do what the Act required of him.

Rex v. *Gregory* (1) was another case relied on. It was a very simple case. An Act of Parliament prohibited the erection of any building within a certain distance of the public road, and contained a positive enactment that if any building should be erected contrary to the statute, it should be deemed a common nuisance. By another clause magistrates were empowered to convict the proprietor, and to make an order for the removal of the building. It was held that notwithstanding this other clause the person erecting the building was indictable for a nuisance. From the language used in the judgments it is plain that the judges relied upon the express words of the statute. Lord Denman, C.J., says: "I have not the least doubt in this case. The Acts expressly say that there shall be a road sixty feet wide, and that no building shall be erected within ten feet of that road. The erection in question is clearly a building within the Acts, and it is within the prohibited distance. As to the proceeding by indictment, it is true that the Act of 3 Geo. 4, gives a summary proceeding before the magistrate, but it also declares that the erection of a building within the prohibited distance shall be deemed a common nuisance"; and, adds the Lord Chief Justice, "a common nuisance is an indictable offence."

There are two other cases to which I must refer. The first is *Reg.* v. *Buchanan.* (2) There a statute had prohibited in general terms persons from acting as attorneys in any court, unless such persons should have been previously admitted and enrolled; and in a latter part of the same statute it had been enacted that any person who did so act without being admitted and enrolled should

(1) 5 B. & Ad. 555. (2) 8 Q. B. 883.

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be unable to recover his fees, and should be guilty of contempt of court, and should be punished accordingly. It was held that an unqualified person might be indicted for misdemeanour under the substantive prohibitory clause. In giving the judgment of the Court, Lord Denman, C.J., said: "I am of opinion that wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. I quite agree that where in the clause containing the prohibition a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But where there is a distinct absolute prohibition the act is indictable." That case would be in point if there had been an absolute prohibition of the various wilful acts charged against this defendant in any other part of the Registration Act, 1843, except the 51st section. There is none; and in the 51st section, which enumerates with extreme precision every possible breach of duty which an overseer can commit, I find that a specific remedy is provided.

The last cited case was *Couch* v. *Steel* (1), in which it was held that a sailor was entitled to bring an action against a ship-owner for the non-supply of medicines on board an English ship, in contravention of 7 & 8 Vict. c. 112, s. 18. The question argued was whether the party aggrieved had any right of action for the breach of statutory duty; and it was held that, although the statute had imposed a penalty which might be recovered at the suit of anybody, still anyone who was personally injured by the breach of public duty could maintain an action for damages. Much of the reasoning in *Couch* v. *Steel* (1) was dissented from by the Court of Appeal in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2); but still the case may properly be cited as an authority. It was referred to on account of some language used by Lord Campbell in giving judgment. He said: "The penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act." The learned counsel for the

(1) 3 E. & B. 402. (2) Law Rep. 6 Ex. 404; 2 Ex. D. 441.

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prosecution drew attention to the words, "the penalty being annexed to the offence, in the very clause of the Act creating it," and argued that because in this case the duty was created by one section of the Parliamentary Registration Act, and the penalty was imposed by another section, an indictment was maintainable for the breach of the duty. Lord Campbell, I am sure, did not mean that it was essential that where a duty was prescribed by a section, the remedy should be contained in the same section. That has never been held. All that the authorities establish is, that where there is a substantive general prohibition in one clause, and there is a subsequent clause which prescribes a specific remedy, the remedy by indictment is not excluded.

I have now examined all the authorities that have been cited, and I repeat that they appear to me, when properly understood, to support the conclusion at which I have arrived—that upon the true construction of this statute creating, or re-creating, a duty, and prescribing a particular penalty for a wilful neglect of that duty, the remedy by indictment is excluded.

An effort has been made by the prosecution to turn the difficulty, if I may use the expression, by framing two counts on the authority of the recent case of *Reg.* v. *Vreones* (1), to the judgment in which I was myself a party. The case was a singular one, but did not present any real difficulty. It appeared that, upon a dispute arising in Bristol between the buyer and the seller of a cargo as to its quality, where arbitration is resorted to, it is the custom to take samples of the cargo, and to forward them to an association which appoints the arbitrator. The samples are called "arbitration samples," and the arbitrators act upon the supposition that they are genuine. What Vreones did was to falsify the arbitration samples; in other words, to place before the association which had the appointment of the arbitrator for the purpose of their being laid before the arbitrator, false samples upon which the arbitrator was bound to act, and thus obviously to directly interfere with the proper course of the proceedings before the arbitrator, who would come to the conclusion, from looking at the falsified samples, that the cargo was what, in fact, it was not.

(1) [1891] 1 Q. B. 360.

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This conduct was beyond doubt an indictable fraud. I cannot apply the reasoning in the case of *Reg.* v. *Vreones* (1) to this case, for the lists prepared by the overseer are not laid by him before the revising barrister at all. They are published openly, copies of them are kept, and the utmost facility is given to everybody to see and correct them before they are transmitted by the overseer to the town clerk; and it is the town clerk's duty afterwards to take them to the revising barrister for the purpose of his revising the lists.

Therefore, it seems to me, that these two counts, the first of which refers to the electoral lists, the second to the register, cannot be sustained. They charge (if they charge anything) an attempt on the part of the defendant to commit what I have held not to be an indictable misdemeanour.

I, therefore, think it my duty to say that this indictment must be quashed.

Indictment quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*

Solicitor for prisoner: *E. T. Hargreaves.*

H. D. W.

KENNEDY, APPELLANT; COWIE, RESPONDENT.

April 23.

Statute—Construction—Act not to apply to Seamen—Offence against Seaman by Person not a Seaman—Conspiracy and Protection of Property Act, 1875 (38 *&* 39 *Vict. c.* 86), *s.* 16.

Section 16 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), which enacts that the Act shall not apply to seamen, means only that the punishments prescribed by the Act are not to fall on seamen. The case of an offence against a seaman by a person who is not a seaman is therefore not excluded from the Act by this section.

CASE stated by justices.

At a petty sessions for the borough of South Shields an information was preferred by Thomas Kennedy, the appellant, against George Cowie, the respondent, under s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). The information charged that the respondent, on January 24, 1891, did unlawfully intimidate the appellant for the

(1) [1891] 1 Q. B. 360.

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purpose of compelling him to abstain from joining the steamship *Fortescue* after he had signed articles to serve thereon as a fireman.

The following facts were proved. The appellant was a fireman, and upon the day in question he had signed articles at the shipping office to serve as such fireman upon a steamship called the *Fortescue*, then lying in the river Tyne, outward bound. Upon leaving the shipping office the appellant was met by the respondent, who was a delegate of the Seamen's and Firemen's Union, but was not himself a seaman, and who, it was alleged, then intimidated the appellant, in consequence of which the latter abstained from joining the *Fortescue*.

It was contended on the part of the respondent that inasmuch as the appellant was a seaman, the case did not fall within the operation of the Conspiracy and Protection of Property Act, 1875, by reason of the terms of s. 16 of that Act, which provides that, "Nothing in this Act shall apply to seamen or to apprentices to the sea service."

The justices found that the appellant was a seaman, and they thereupon dismissed the information on the ground that the case was within the above exemption.

The question for the opinion of the Court was whether the justices were right in so determining.

Forrest Fulton, for the appellant. Sect. 16 of 38 & 39 Vict. c. 86, does not take this case out of the operation of that Act. The criterion is whether the person who intimidates is a seaman, not whether the person intimidated is one. Here the respondent was not a seaman, though the appellant undoubtedly was one. Seamen committing the offence of intimidation are exempt from the provisions of this Act, because there is a special disciplinary code applicable to them, viz., the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 239, et seq.

J. Lawson Walton, Q.C. (*Reginald Neville*, with him), for the respondent. The words of s. 16 of 38 & 39 Vict. c. 86, are wide enough to apply where the offence is committed against a seaman and not only where it is committed by one. The history of the legislation on the subject shews that it was intended to entirely confine the operation of this Act to workmen on land. Thus

neither of the former Acts, 6 Geo. 4, c. 129, and 34 & 35 Vict. c. 32, would have applied in this case, for the words used throughout those Acts are "master" and "workman." It was only by reason of the substitution of the neutral word "person" in 38 & 39 Vict. c. 86, that it became necessary to expressly provide that the Act should not apply to seamen. There are already two statutes dealing with offences of this description against seamen, viz., 24 & 25 Vict. c. 100, s. 40, where there is violence, and 17 & 18 Vict. c. 104, s. 257, where there is persuasion only without violence. It is not to be presumed, therefore, that it can have been intended that there should be an additional remedy under 38 & 39 Vict. c. 86: *Great Northern Fishing Co.* v. *Edgehill.* (1)

Fulton, in reply. The offence of intimidation of seamen is not dealt with by any other Act.

DAY, J. It seems to me that the magistrates have misconstrued s. 16 of the Conspiracy and Protection of Property Act, 1875. The question is whether there was here any offence by the respondent under s. 7, sub-s. 1, of that Act. It has not been questioned that there was such an offence, unless the saving contained in s. 16 applies in this case. That section says that nothing in the Act is to apply to seamen. But I am clearly of opinion that all which is meant by this saving clause is that nothing in the Act shall make persons who are seamen responsible for the offences there dealt with. That is to say, the penalties and punishments provided by the Act are not to fall upon seamen. It is not meant that anyone may commit those offences upon seamen. The case must, therefore, be remitted to the magistrates with this expression of our opinion.

LAWRANCE, J., concurred.

Case remitted to justices accordingly.

Solicitors for appellant: *Botterell, Roche, & Temperley, Newcastle-on-Tyne.*

Solicitor for respondent: *A. A. Nowell, for Robert Jacks, South Shields.*

P. B. H.

(1) 11 Q. B. D. 225.

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Feb. 11, 12.

WESTACOTT *v.* BEVAN AND ANOTHER.

Solicitor—Lien—Charging Order—Money paid into Court—Claim and Counter-claim—Property "recovered or preserved"—23 & 24 *Vict. c.* 127, *s.* 28.

The plaintiff claimed 742*l.* for work done under a contract to repair the defendants' ship. The defendants paid 500*l.* into court, with a denial of liability, and counter-claimed damages for the plaintiff's delay in completing the work according to the contract. The plaintiff proceeded with the action, and in the result 465*l.* was found to be due to him on his claim, and 210*l.* to the defendants on their counter-claim :—

Held, that the sum paid into court was not property "recovered or preserved" by the exertions of the plaintiff's solicitor within the meaning of 23 & 24 Vict. c. 127, s. 28, so as to entitle him to charge the whole sum with payment of his costs.

Held, also, that the claim and counter-claim must be treated as one action for the purpose of determining the solicitor's right to a charging order for his costs; that the sum recovered in the action was the balance remaining in favour of the plaintiffs after deducting from the amount found to be due on his claim the amount found to be due to the defendants on their counter-claim, and therefore that the plaintiff's solicitor was only entitled to a charging order in respect of that balance.

APPEAL from an order of Pollock, B., at chambers.

In answer to a claim for 742*l.*, being the balance alleged to be due for work done and materials supplied by the plaintiff to the defendants in repairing their ship, the defendants paid into court 435*l.* (subsequently increased to 500*l.*) under Order XXII., and pleaded, whilst denying all liability, that the same was enough to satisfy any claim which the plaintiff could establish against them. They also counter-claimed 750*l.* as damages sustained by them by reason of the plaintiff's delay in completing the work according to his contract, and the consequent detention of the ship in the plaintiff's hands.

The plaintiff's solicitor before the trial of the action obtained, ex parte, from Huddleston, B., an order under 23 & 24 Vict. c. 127, s. 28, declaring him entitled to a charge upon the sum paid into court for payment of his costs, and Pollock, B., at chambers, subsequently affirmed that order.

The defendants gave notice of motion by way of appeal from the decision of Pollock, B., and asked that the order of Huddleston, B., should be varied by directing that the charge of the

plaintiff's solicitor for his costs should extend only over the amount (if any) which might be ordered to be paid to the plaintiff out of the money in court. The action was afterwards referred for trial to one of the official referees, who found that the plaintiff was entitled to 465*l.* on his claim, and the defendants were entitled to 210*l.* on their counter-claim, leaving a balance in favour of the plaintiff of 255*l.*

The motion now came on for hearing.

E. U. Bullen, for the defendants. The sum paid into court by the defendants is not money "recovered or preserved" through the instrumentality of the plaintiff's solicitor within the meaning of s. 28 of 23 & 24 Vict. c. 127, so as to entitle the solicitor to a charge upon it for his costs. The plaintiff might have taken the money out of court in satisfaction of his claim; but he chose to proceed with the action, and has recovered less than the sum paid in. Under the circumstances, the solicitor is not entitled to a charge upon the whole sum paid in: *Lloyd* v. *Jones* (1); *Rowland* v. *Williams*. (2) In *Emden* v. *Carte* (3) the money paid into court was taken out in satisfaction of the claim, and it was therefore "recovered or preserved" within s. 28. The defendants are entitled to set-off the sum they recovered on their counter-claim against the sum recovered by the plaintiff on his claim: *Pringle* v. *Gloag* (4); and the plaintiff's solicitor is only entitled to a charge in respect of the balance.

H. F. Dickens, for the plaintiff's solicitor. The money paid into court by the defendants became a fund "preserved" by the exertions of the plaintiff's solicitor within s. 28 of 23 & 24 Vict. c. 127: *Emden* v. *Carte* (5); *Berdan* v. *Greenwood* (6); *Moxon* v. *Sheppard*. (7) It is contended that the solicitor would have been entitled to a charge upon that fund, even if the plaintiff had recovered nothing, and the defendant had got his costs. The principle to be deduced from the cases is correctly stated in the Annual Practice, 1890–91, at p. 174, as follows: "The principle

(1) 40 L. T. Rep. 514.
(2) W. N. (1885) 169.
(3) 19 Ch. D. 311.
(4) 10 Ch. D. 676.
(5) 19 Ch. D. 311, judgment of Jessel, M.R., at p. 317; and of Brett, L.J., at p. 322.
(6) 3 Ex. D. 251, judgment of Thesiger, L.J., at p. 257.
(7) 24 Q. B. D. 627.

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is this, if a man by the exertions he is employed to give has recovered or preserved—i.e., created—a fund, which, but for those exertions would not have existed, the costs incurred by him ought to be the first charge upon it; the charge will be upon the whole fund, whether it all belongs to the client or not, and will be for the costs taxed and to be taxed." The payment into court was irrespective of the counter-claim; it was in respect of the claim only. The defendants cannot withdraw any part of the sum paid into court in order to satisfy their counter-claim, and the solicitor is, at any rate, entitled to a charge upon the sum paid into court to the extent of the sum recovered by the plaintiff on his claim. Before the Judicature Acts, when there were cross-actions, the amounts recovered could not be set off, though it is conceded that where cross-demands could be set off in equity the solicitor's lien was only to be allowed for the balance. Since the Judicature Acts the claim and counter-claim must for this purpose be treated as two independent actions: *Shrapnel* v. *Laing* (1); *Amon* v. *Bobbett*. (2)

[WILLS, J. In *Amon* v. *Bobbett* (2) Lord Esher, M.R., says that they are to be treated as two independent actions for the purpose of taxation, and Bowen, L.J., says they are to be so treated for the purposes of justice. Those are very important qualifications.]

Pringle v. *Gloag* (3) does not contravene the general rule. It was a decision merely that costs might set off against a debt under an award made in an arbitration between partners, and that the right of set-off was not interfered with by the ordinary solicitor's lien for costs. [He also referred to *Wright* v. *Mudie* (4); *Taylor* v. *Popham*. (5)]

E. W. Bullen was asked to confine his reply to the point, whether the claim and counter-claim ought to be treated as independent actions for the purpose of determining the extent of the solicitor's right to a charge for his costs.

The claim and counter-claim cannot be regarded as two separate actions in the present case. The damages recovered on the counter-claim can be set off against the sum recovered on the

(1) 20 Q. B. D. 334.
(2) 22 Q. B. D. 543.
(3) 10 Ch. D. 676.
(4) 1 S. & S. 266.
(5) 15 Ves. 72.

claim. Both claim and counter-claim arise out of the same transaction, namely, the contract between the plaintiff and the defendants with respect to the repairs of their ship. It is clear that, if the counter-claim can be the subject-matter of set-off, the solicitor's right to a charge or lien for his costs can only extend to the balance.

[He referred to *Bankart* v. *Tennant* (1); *Young* v. *Kitchen* (2); *Government of Newfoundland* v. *Newfoundland Ry. Co.* (3)]

WILLS, J. I am clearly of opinion that the charge which the plaintiff's solicitor has obtained cannot be maintained. I am satisfied that the solicitor's claim cannot be supported in principle. It was attempted to be supported in two ways. It was said that the defendants, having paid into court 500*l.* with a denial of liability, the plaintiff was then entitled to take that sum out of court in satisfaction of his claim, and therefore that it became a fund "preserved" by the exertions of the solicitor. I think that is an entire fallacy. The plaintiff did not take the money out of court, but proceeded with his action. He was claiming more than 500*l.*, and he could only take the 500*l.* out of court by abandoning the rest of his claim. The result of proceeding further with the action was not to preserve but to jeopardize the plaintiff's chance of getting the 500*l.* The solicitor, therefore, upon whose advice the plaintiff must be taken to have proceeded further, certainly did nothing after that time to preserve the property for the plaintiff, but the reverse. The decision of the Court of Appeal in *Emden* v. *Carte* (4) has no application to the present case, because there both the bankrupt and his trustee had elected to take the money out of court in satisfaction of the claim. Both, therefore, had abundant claim to the money, which, when they exercised their right to take it out of court, became at their absolute disposal. As often happens, language was used by the Court of Appeal in giving judgment which, though perfectly applicable to the facts of the case before them, becomes fallacious when it is sought to be applied to an entirely different state of facts. I am of opinion,

(1) Law Rep. 10 Eq. 141.
(2) 3 Ex. D. 127.
(3) 13 App. Cas. 199.
(4) 19 Ch. D. 311.

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therefore, that the money paid into court by the defendants was not money preserved by the exertions of the solicitor in the present case.

Next, it was strenuously argued by the plaintiff's counsel that the claim and counter-claim are substantially two actions, and therefore that the sum recovered by the plaintiff on his claim must be taken to be the fund recovered by the exertions of his solicitor, so as to entitle the latter to a charge upon it for his costs. Expressions used in the judgments in various cases were cited as establishing that proposition; but, in every instance, those expressions are covered by other expressions, which, to my mind, deprive them of any necessary application to the present case, and leave us quite unfettered. In each of the cases cited, the question arose with respect to the taxation of costs. The question here is not one of costs. In *Amon* v. *Bobbett* (1), Bowen, L.J., says that a counter-claim is to be treated, "for all purposes for which justice requires it to be so treated," as an independent action. If that test be applied here, nothing could be more unjust than would be the result of what is asked. By Order XIX., rule 3, "a defendant in an action may set off, or set up by way of counter-claim, against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim," but the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot conveniently be disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof. I take it that, ordinarily speaking, if a counter-claim is set up in respect of matters totally unconnected with the claim, the jurisdiction given by Order XIX., rule 3, would be exercised, and the counter-claim would not be allowed to be disposed of in the same action. But here the cross-claims are intimately connected one with the other. It seems to me impossible to deny that where the plaintiff is claiming to recover the price of work and

(1) 22 Q. B. D. 543.

labour under the contract, and the defendants are counter-claiming damages for the plaintiff's delay in completing the work according to the contract, both claim and counter-claim arise out of the same transaction. The claim and counter-claim make up one action, in which there will be one result, and although for the purpose of giving an obvious direction to the master, the form of entering judgment is that the plaintiff do recover so much on his claim, and the defendant so much on his counter-claim, yet for all other purposes the balance due to the plaintiff after deducting from the amount recovered on the claim the amount recovered on the counter-claim should be regarded as the essential award in his favour. The sum recovered is the sum essentially recovered in the action. I cannot express my view in better language than that used by Hall, V.-C., in *Robarts* v. *Buèe*. (1) He says, "The principle is that where a solicitor is employed in a suit or action, he must be considered as having adopted the proceedings from the beginning to the end, and acted for better or worse. His client may obtain costs in some matters in the suit or action, and not in others, and the solicitor takes his chance, and may ultimately enforce his lien for any balance that may appear to be in favour of his client." In an action like this, the plaintiff's solicitor must know that cross-claims are likely to be set up, and it would be unjust to allow the whole sum paid into court to be charged with payment of his costs under these circumstances. I am of opinion, upon every principle which can apply to this case, that the claim of the solicitor fails.

VAUGHAN WILLIAMS, J. I am of the same opinion. The argument on the first point was based upon a passage from the Annual Practice for the current year, p. 174. The meaning of that passage was said to be that when a defendant pays money into court with a denial of liability, the plaintiff's solicitor is entitled to charge it with payment of costs, and that was said to be the case no matter what the result of the action might be, and even although the defendant wholly succeeded in maintaining his defence. That consequence would be so monstrously unjust that the question only needs stating to answer itself.

(1) 8 Ch. D. 198, at p. 200.

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Williams, J.

The only other point taken was with respect to the right of set-off. It was admitted that where cross-claims can be set off one against the other, the solicitor's right must be limited to a charge upon the balance remaining in the plaintiff's favour, but he argued that where there is a claim and a counter-claim the amount recovered on the counter-claim cannot be set off against the amount recovered on the claim. Now, I do not mean to say that there may not be cases in which the respective claims of the plaintiff and the defendant are so dissimilar and foreign in their nature, that the amount recovered on the counter-claim cannot be set-off against the amount recovered on the claim, but where the claim and counter-claim are founded upon the same contract the defendant has a right to set off the amount recovered on his counter-claim against the amount recovered on the claim. The point is decided in the *Mersey Steamship Company* v. *Shuttleworth & Co.* (1) In that case the plaintiffs' claim for a liquidated sum for freight was admitted, but the defendant set up a counter-claim for unliquidated damages for breach of the plaintiff's contract to carry certain cargo between certain ports. The plaintiffs asked for judgment under Order XIV. The Court of Appeal refused to allow judgment to be entered under Order XL., r. 10, or to order the defendants to pay the amount claimed into Court, on the ground, I take it, that the counter-claim was so much in the nature of a set-off and defence to the action that it would be unjust to grant the application. I think the present case must be treated in the same way. I am of opinion, therefore, that the plaintiff's solicitor is only entitled to charge the balance which remains in the plaintiff's favour, after deducting the sum recovered on the counter-claim. In *Shrapnel* v. *Laing* (2), and the other cases cited, the observations of the judges were clearly limited to the question of taxation of costs.

Appeal allowed.

Solicitor for plaintiff: *Robert Greening.*

Solicitors for defendant: *F. W. & H. Hilbery.*

(1) 11 Q. B. D. 531. (2) 20 Q. B. D. 334.

W. A.

HOARE *v.* NIBLETT.

1891
April 13, 14, 23.

Contract—Joint Contractors—Married Woman a Joint Contractor—Judgment against other Joint Contractor—Res Judicata.

The rule that judgment recovered against one of two joint contractors is a bar to an action against the other applies equally when one of the joint contractors is a married woman contracting in respect of her separate property.

APPEAL from the judgment of the judge of the Clerkenwell County Court, non-suiting the plaintiff.

The action was brought against the defendant to recover damages for breach of an agreement to let to the plaintiff a house together with the furniture and effects therein, and to give to the plaintiff the option of purchasing such furniture and effects. The contract was in writing, and was signed by one Vincent as agent for Charles Niblett, the husband of the defendant. The plaintiff sued Charles Niblett for breach of the agreement, and recovered judgment against him for 30*l.* damages and costs. That judgment was only in part satisfied. Subsequently the plaintiff commenced a second action against the defendant, the wife of Charles Niblett, upon the same contract and for the same breaches, alleging that Vincent had signed the contract not only on behalf of Charles Niblett, but also on behalf of his wife, the defendant. The defendant objected that this action was not maintainable because of the judgment recovered in the previous action, and the judge non-suited the plaintiff who appealed.

Willis, Q.C., and *P. T. Blackwell*, for the plaintiff.

G. Laing, for the defendant.

The arguments are sufficiently stated in the judgments.

Cur. adv. vult.

April, 23. A. L. SMITH, J. The question in this case is whether the learned judge of the county court at Clerkenwell was right in non-suiting the plaintiff.

The circumstances of this case are as follows. By agreement in writing, dated September 19, 1888, Charles Niblett, the

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A. L. Smith, J.

husband of the present defendant, by his agent Vincent, contracted to let to the plaintiff No. 42, Upper Bedford Place, Russell Square, together with the furniture and effects therein for the term of one year, and thereby contracted to give to the plaintiff the option of purchasing such furniture and effects. This contract Charles Niblett broke, and thereupon the plaintiff sued him for not letting the house to her, and for not giving her the option to purchase, and ultimately recovered judgment against him for 30*l.* damages and costs. Charles Niblett only in part satisfied this judgment and then became bankrupt. The plaintiff thereupon commenced another action against the present defendant, the wife of Charles Niblett, upon the same contract and for the same breaches for which she had sued Charles Niblett. Objection was taken that this second action was not maintainable by reason of the well-established rule of law that a joint contractor cannot be sued in a second action upon the same contract, though not a party to the first action in which judgment had been recovered, the reason, as I understand it, being that there can only be one judgment upon one entire contract: *Kendall* v. *Hamilton* (1); and see the judgment of Vaughan Williams, J., in *Hammond* v. *Schofield*. (2) The learned judge held the objection well founded, and nonsuited the plaintiff. The way the plaintiff sought to make out a case against the defendant was by shewing that Vincent in reality contracted with her not only on behalf of Charles Niblett, as stated in the contract, but also on behalf of his wife the present defendant, and it must be taken that legal evidence can be produced in that behalf. This case may therefore be discussed upon the hypothesis that both the husband and wife had signed the contract of September 19, 1888. Mr. Willis for the plaintiff asserts that, even if it were so, the husband and wife are not joint contractors upon one entire contract, because by the contract the wife could only contract in respect of her separate estate, whereas the husband contracted personally, and he says that consequently there were two contracts and not one. It must however be pointed out that they both contracted by one contract in writing to do the same identical thing; they both committed the same breaches,

(1) 4 App. Cas. 504. (2) [1891] 1 Q. B. 453, 457.

and both became liable for the same amount of damages. Why then is this not one entire contract jointly entered into by both? The argument of Mr. Willis goes the length of asserting that a married woman cannot by possibility enter into a joint contract, for if she enters into a contract conjointly with another, she must always contract in respect of something the other does not, and that this is so even if she jointly contracts with another married woman. This proposition I have never heard before, and I do not agree with it. Fry, L.J., in the case of *Whittaker* v. *Kershaw*, says (1): "The effect of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, as it appears to me, is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, that her power to contract is limited, and that the remedy is confined to her separate estate. The right of action is the same as against a man, but the relief is different." It seems to me that she can contract in the same way as a man, subject to this, that she must have separate estate at the date of the contract, which the man of course need not. It appears to me that Mr. Willis is in this difficulty, if the defendant had separate estate when she contracted, she can contract as a feme sole, and consequently can enter into a joint contract, if she has not, she cannot contract at all. So whichever way it is taken the plaintiff cannot succeed, for if the defendant had separate estate then the rule of law about joint contractors applies, and if not then she cannot be sued; whichever way you take it the plaintiff must be non-suited.

For these reasons it appears to me that the learned county court judge was right in non-suiting the plaintiff. It is unnecessary to decide any further point taken by defendant, and in my judgment this appeal must be dismissed with costs.

GRANTHAM, J. In my judgment this non-suit was right. The plaintiff contended that the goods, the subject of this action, being claimed by Mrs. Niblett in her husband's bankruptcy as her goods, and not C. Niblett's, at the time the contract was made by him with the plaintiff, the plaintiff can now sue

(1) 45 Ch. D. 320, 329.

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Grantham, J.

Mrs. Niblett and recover against her separate estate the damage for a breach of so much of the contract made between the plaintiff and C. Niblett as relates to these goods. Assuming there had been no other proceedings taken under this contract which ended in judgment being obtained by the plaintiff against C. Niblett, I think the plaintiff could have maintained such an action, but as in this case the plaintiff first sued C. Niblett, not as agent at all, but as principal, and got judgment against him, she cannot now sue the wife. If the wife be treated as an undisclosed principal, the plaintiff is precluded from maintaining the action, because the only written contract is one by Vincent as agent for the husband, and if the husband is treated as agent for the wife then there is a judgment outstanding against the agent, and until that is set aside you cannot maintain another action against the principal. If the husband and wife are both treated as principals, the wife contracting in reference to her separate estate, she must have entered into a joint contract with her husband; because the transaction being one, the contract being one, the subject-matter of the contract being the same, it is exactly the same cause of action on which the plaintiff first sued, viz. a contract to put her in possession of these goods, and she having obtained a judgment on that cause of action it must be treated as a judgment obtained against one of two joint contractors, and no authority has been suggested that takes the case out of the ordinary law above referred to.

Appeal dismissed; leave to appeal refused.

Solicitors for plaintiff: *Law & Son.*
Solicitor for defendant: *Essell.*

W. A.

THE QUEEN *v.* THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

1891
April 9.

Bank of England—Mandamus—List of Stock transferred to National Debt Commissioners—Inspection of—Applicant without bonâ fide Interest—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *s.* 52.

By s. 52 of the National Debt Act, 1870, the Bank of England are directed to keep a list of unclaimed stock, transferred to the National Debt Commissioners, which list is to be "open for inspection at the usual hours of transfer."

Upon an application for a mandamus to compel the Bank to allow inspection of the list to the applicant, who carried on business as a "next of kin and unclaimed money agent," and desired inspection in order to make a copy of the list for the purposes of his business:—

Held, that inasmuch as the applicant did not shew that he, bonâ fide, claimed an interest in any unclaimed stock, either on his own behalf, or as representing some other person, he was not entitled to inspection of the list, under s. 52.

MANDAMUS.

Upon the application of Gilbert Terrell a rule nisi was granted, calling upon the Governor and Company of the Bank of England to shew cause why a writ of mandamus should not issue, directed to them, commanding them to keep a list of unclaimed dividends which had been carried to the credit of the commissioners for the reduction of the National Debt, and to produce such for inspection pursuant to the National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 52. (1)

The applicant, in the affidavits filed by him, stated that he carried on the business, as Adams & Co., of a publisher and next-of-kin and unclaimed money agent; in connection therewith he collected information with regard to all sums of money remaining

(1) National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 51: "All stock, no dividend whereon is claimed for ten years before the last day on which a dividend thereon becomes payable (except where payment of dividend has been restrained by a Court of Equity), shall be transferred in the books of the Bank of England . . . to the National Debt Commissioners."

Sect. 52: "Immediately after every such transfer the name in which the stock stood immediately before the transfer, the residence and description of the parties, the amount transferred and the date of transfer, shall be entered in a list to be kept for the purpose by the bank in whose books the stock stands, which list shall be open for inspection at the usual hours of transfer."

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unclaimed, and published a list of the names of the persons to whose credit such unclaimed money stood, in order that the knowledge thereof might come to such persons, or, if dead, to their representatives, and they might thereby obtain possession of such moneys; in September, 1890, he was preparing a supplement to his list of persons to whom unclaimed money was due, and applied by letter to the Governor of the Bank to be permitted to inspect the list of unclaimed dividends in the national funds, to which he received a reply that the public had not been allowed to inspect the list for many years, as it was found that very little good accrued to owners of unclaimed stock by such permission, and the Bank declined to furnish him with a copy of the list; after further correspondence the Bank declined to allow him to inspect the list.

In the affidavits filed on behalf of the Bank, it was stated by the chief accountant that a list was duly kept in accordance with the statute. That from about the year 1791 to 1845, lists of the holders of unclaimed stock and dividends were printed and published by the Bank at irregular intervals, but since the latter year these printed lists had been discontinued in consequence of its having been found that they were used for the purposes of fraudulent extortion. It was found that little advantage accrued to the owners of unclaimed stock through the publication of such lists, an advantage so slight as not to bear comparison with the advantage of the present system of sending notices, but that they led to false claims being made by fraudulent persons, and that they gave opportunity to agents, who had such lists, to obtain extortionate sums from persons who wished to obtain information. The present practice of the Bank is to send out notices respecting unclaimed stocks and dividends to all stockholders at the expiration of nine and a half years, and in every case in which the notices are returned by the Post-office further efforts are made, where possible, to trace the stockholders through their stockbrokers or through the persons who may have acted for them under powers of attorney, and, in short, stock does not now reach the hands of the National Debt Commissioners until all means of communicating with the stockholders have been exhausted. In cases in which dividends remained unre-

ceived upon stock which has been disposed of, notices are sent to the stockholders three months after the disposal of the stock, and the Bank at all times gratuitously affords every assistance in its power to persons applying to them in the belief that they are interested in unclaimed stock. The effect of this practice has been a large reduction in the amount of unclaimed stock and dividends. Many of the old printed lists still exist and are in the possession of "claim" and "next of kin" agents. Most of the amounts referred to in those lists have long since been recovered by the persons entitled, but the entries are still used as a means of obtaining fees for futile searches. The list now published by the applicant states that the records relating to any name in the list will be searched for one guinea prepaid. Very many of the names in such list relate to stock and dividends which have been restored to claimants, after proof to the satisfaction of the Bank, and have been advertised as claimed.

Sir R. Webster, *A.G.*, *Greene*, *Q.C.*, and *R. Bray*, for the Bank, shewed cause. The application to inspect the list was made by a person who had not any such interest as would entitle him to inspect, being made by a person carrying on the business of a next of kin office, and solely for the purposes of that business; he has no other bonâ fide interest in inspecting the list, and is not acting for any public benefit or advantage. The words in s. 52 of the National Debt Act, 1870, "shall be open for inspection," only mean open for inspection by persons bonâ fide claiming an interest in the unclaimed stock, or acting on behalf of another who bonâ fide claims such an interest. A person claiming to inspect books under a statutory provision must shew some reasonable ground for his claim before the Court will grant him a prerogative writ of mandamus, which it may refuse to grant in the exercise of its discretion: *Reg.* v. *London and St. Katharine's Docks.* (1)

Gaskell, for the applicant. In the case of *Reg.* v. *London and St. Katharine's Docks* (1), the right of inspection was expressly limited to a particular class of persons, namely shareholders, whereas in this case there is no limitation upon the right of

(1) 44 L. J. (Q.B.) 4.

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inspection, and therefore that case is no authority here. Under the Act now under consideration the Bank have no right to make any inquiries, or to ask why any person wishes to inspect; every member of the public has a right to demand inspection; the Act contains no limitation whatever requiring that an applicant for inspection should claim a bonâ fide interest in the stock or dividends. It is no answer to this application to say that the bank have taken effective means to enable all possible claimants to trace stock.

A. L. SMITH, J. This is an application by one Terrell for a mandamus to compel the Bank of England to allow him to have inspection of the list of unclaimed stock and dividends which is kept by the bank. The applicant founds his application upon s. 52 of 33 & 34 Vict. c. 71, and asserts that he is entitled to inspect this list, and that we ought to issue a prerogative writ of mandamus to enable him to do so. The applicant has stated who and what he is, and his object in asking for this inspection: his affidavit states that he carries on the business of next of kin and unclaimed money agents, and publishes a list of unclaimed money. He publishes this publication for the purpose of getting people whose names, or the names of whose relations, appear in the list to apply to him and pay a fee of a guinea for further information, and of so carrying on his own private business. There is no scintilla of a suggestion that he has any personal interest, or any interest for a particular person, in desiring to make his search, but he urges that he has a right, under s. 52, to make the search, and that he is entitled to this prerogative writ of mandamus. Now s. 51 of the Act provides that stock, whereon no dividend has been claimed for ten years, shall be transferred, in the books of the Bank, to the National Debt Commissioners. That has been done. Then s. 52 enacts that "immediately after every such transfer the name in which the stock stood immediately before the transfer, the residence and description of the parties, the amount transferred, and the date of transfer shall be entered in a list to be kept for the purpose by the Bank, which list shall be open for inspection at the usual hours of transfer." What is the meaning of the words "shall be open for inspection"? Do

they mean open for the inspection of any person who is interested in the unclaimed dividends and stock, or for the inspection of any member of the public? I think that they mean inspection by a person so interested, or by a bonâ fide applicant on behalf of a person so interested. That, in my opinion, is the meaning of the enactment, and, if that be so, the applicant here is altogether outside the statute. No harm whatever is done to the public by so construing the Act, when we consider what the practice of the Bank has been as stated in the affidavit of the chief accountant. That practice has proved most beneficial, for since it has been adopted there have been far fewer unclaimed dividends than before. Upon the facts it seems to me that Terrell is not a bonâ fide applicant on behalf of any person interested in the stock or dividends, or as to any person whose name appears in the list. He desires to inspect the list simply for his own purposes and for his own business. Under those circumstances this prerogative writ of mandamus, in the issue of which we ought to exercise our judicial discretion, ought not to be issued to assist this applicant, and the rule must be discharged.

GRANTHAM, J. I am of the same opinion. The affidavits set forth accurately the object of the applicant in asking for inspection. It is desired for the purposes of a publication issued by the applicant. Looking at the list which he publishes, it does not seem to me to be published in such a way as to convey to persons who may be interested in unclaimed dividends or stock knowledge which can be of any real use to them; sufficient particulars are not given, and some particulars, given in the Bank's list, are omitted. The sole object of the applicant is to get a list of names which he can publish, and so induce persons to pay him fees of a guinea for the purposes of his business. This being an application for the issue of a prerogative writ of mandamus, the Court, in my opinion, should in its discretion refuse to grant it for such purposes as are desired in this case.

Rule discharged.

Solicitors for the Bank of England: *Freshfields.*
Solicitor for the applicant: *J. H. Lee.*

W. A.

1891
April 14.

FLETCHER, APPELLANT; FIELDS, RESPONDENT.

Metropolis—Streets—Obstruction—Loading or Unloading Coal—Coke—Metropolitan Streets Act, 1867 (30 & 31 *Vict. c.* 134), *s.* 15.

Coke is not "coal" within the meaning of s. 15 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), which prohibits the loading or unloading of "coal" on or across the footway between certain hours, and imposes a penalty for so doing.

CASE stated by a metropolitan police magistrate.

The case stated that:—

1. The appellant was summoned by the respondent, an inspector of police, for having, on October 23, 1890, in Victoria Street, within the special limits of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), between the hours of 10 A.M. and 6 P.M., unlawfully unloaded a quantity of coke across the footway, contrary to s. 15 of the above Act.

2. It was proved that the appellant, a carman in the service of the Gas Light and Coke Company, had on October 23, 1890, about 10.30 A.M. unloaded a quantity of coke across the footway in Victoria Street, which was within the special limits of the Metropolitan Streets Act, 1867.

3. It was contended for the appellant that coke was not coal within the meaning of s. 15 of the said Act.

4. It was not disputed that unloading coke was as objectionable as unloading coal, and within the mischief intended to be guarded against by the said Act (1), and the magistrate held that coke was coal within the meaning of s. 15 of the said Act, and convicted the appellant of the said offence under the said section.

The question for the opinion of the Court was, whether the appellant could upon the evidence be properly convicted of the offence mentioned in s. 15 (2) of 30 & 31 Vict. c. 134.

(1) It was objected by counsel for the appellant that there was no evidence before the magistrate or no admission which justified this statement in par. 4, and the Court was asked to send back case to be re-stated, if they considered that statement to be material, but the Court intimated their opinion that the statement was immaterial.

(2) Sect. 15 provides: "Between the hours of ten o'clock in the morning

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H. Avory, for the appellant. This conviction was wrong, no offence having been committed under the statute. Coke is not coal, but is a residual product which is produced in the manufacture of gas from coal. In the various Acts in which the legislature deals with coke it is distinguished from coal and dealt with separately—14 & 15 Vict. c. cxlvi. ss. 35, 36. In the London Coal Dues Abolition Act, 1889 (52 & 53 Vict. c. 17) "culm and cinders" are expressly mentioned together with "coal," showing that "coal" was not intended to include "cinders." If "cinders" are not "coal," neither is "coke."

T. E. Scrutton, for the respondent. In the dictionaries "coke" is defined to be a variety of "coal." In the Imperial Dictionary "coke" is defined as "coal deprived of its bitumen, sulphur, or other extraneous or volatile matter by fire." "Coke" is only "coal" which has been treated in a particular manner: it is clearly within the mischief aimed at by the Act.

A. L. SMITH, J. This is an appeal against a conviction by a metropolitan police magistrate, and the question raised is a very small one. The conviction was under s. 15 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), but before considering that section I wish to refer to s. 6 of the Act, which provides that: "No goods or other articles shall be allowed to rest on any footway . . . for a longer time than may be absolutely necessary for loading or unloading." Now, that section is intended to prevent obstruction by *any* goods or other articles of any kind. Then comes s. 15, which contains an express prohibition as to two articles only, coal and casks, and between specified hours. In this case we are asked to hold that the legislature included something else when it said coal and casks: but the two articles, coal and coke, were then well known and

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and six o'clock in the evening, no coal shall be loaded or unloaded on or across any footway within the special limits of this Act, and between the same hours and within the same limits no casks, whether empty or full (wine or spirits in cask excepted), shall be lowered or drawn up by means of ropes, chains, or other machinery passing across the footway or any part thereof.

"Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding forty shillings."

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A. L. Smith, J.

might have been both specified. The Act imposes a prohibition upon the public as to two specified articles only, and imposes penalties. Why should we stretch the provisions of the Act so as to extend the prohibition and penalty to another article? I think that we are not at liberty to do so. It is admitted that cinders are not within the prohibition as to coal, and it seems to me that coke is no more coal than cinders are. I think we ought not to add a further prohibition to the absolute prohibition, as to two named articles, imposed upon the public by this section. The decision of the magistrate was wrong, and the conviction must be quashed.

GRANTHAM, J. I am of the same opinion. This is a statutory restriction upon the liberty of the public, and must not be extended beyond its precise terms. It is clear that the object of this section was to prevent a nuisance in those cases in which it most usually occurred, and the two articles, coal and casks, were selected for prohibition. No prohibition as to any other articles is contained in that section. If the legislature had intended to include coke, in my opinion, it would have expressly said so. Coke is a manufactured article, and is not coal; it is not expressly included in this prohibition, and therefore is not within the section.

Conviction quashed.

Solicitors for appellant: *Bedford, Monier-Williams, & Robinson.*

Solicitors for respondent: *Wontner & Sons.*

W. A.

THE QUEEN *v.* COUNTY COURT JUDGE OF HALIFAX AND ANOTHER. 1891 *Feb.* 10, 11; *April* 22.

County Court—Jurisdiction—Action for Infringement of Patent—Franchise—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.

The grant of letters patent for the use of a new invention is a "franchise" within the meaning of the proviso in s. 56 of the County Courts Act, 1888; so that the county courts have no jurisdiction to try an action for the infringement of a patent where the validity of the patent is in dispute.

RULE calling upon the judge of the county court of Yorkshire, holden at Halifax, and P. Bairstow, the defendant in an action of *Sutcliffe* v. *Bairstow*, to shew cause why a writ of mandamus should not issue commanding the judge to hear and determine the action.

The plaint in the county court claimed an injunction to restrain the infringement by the defendant of a patent right assigned to the plaintiff, and an account and damages.

The defendant's solicitor gave notice that he intended to dispute the validity of the patent.

When the case came on for hearing in the county court, the udge, upon the objection of the defendant's counsel, held that he had no jurisdiction to try the action.

This rule was thereupon obtained on behalf of the plaintiff.

T. Terrell, for the county court judge and the defendant, shewed cause. There is no jurisdiction in the county court to try an action in which the validity of a patent is in issue. By s. 56 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), jurisdiction is given in "all personal actions where the debt, demand, or damage claimed is not more than 50*l*.," and there follows a proviso that the Court shall not have cognizance of "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction or breach of promise of marriage." The grant of letters patent for a new invention is a grant of a right or privilege to the subject by the exercise of the royal prerogative: Bacon's Abridg. vol. vi., "Prerogative," pp. 383, 499, 500. The great seal was appended

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to letters patent until the year 1883, when the seal of the Patent Office was substituted by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). The Statute of Monopolies (21 Jac. 1, c. 3), s. 5, excepted from the prohibition against trade monopolies grants of letters patent to use new manufactures, and limited the royal power in that respect to grants of the right of user for a reasonable time only. The right or privilege is of an incorporeal nature. It is a mere naked right which, if the patent itself did not make assignable, would be inseparable from the person of the grantee: Hindmarsh on Patent Privileges, p. 233: *Dunnicliff* v. *Birkin.* (1) Such a right or privilege is a "franchise" within s. 56 of the County Courts Act, 1888. A franchise is defined in Blackstone's Commentaries, vol. ii. p. 37, "Franchises," as "a royal privilege or branch of the king's prerogative subsisting in the hands of a subject"; and he also says that "franchise" and "liberty" are used as synonymous terms: see also Termes de la Ley, p. 462. The Patents, Designs, and Trade Marks Act, 1883, by implication, enacts that patent actions can only be tried in the High Court. It provides special machinery and procedure which cannot be applied in the county court, and by s. 117 "the court" for the purposes of the Act means the High Court of Justice in England. Sect. 111 saves the jurisdiction of courts in Scotland and Ireland with respect to enforcing patent rights, and it is reasonable to suppose there would have been a similar provision with respect to county courts in England if they had the jurisdiction claimed; and where the legislature gave to the County Palatine Court of Lancaster the same jurisdiction as the High Court of Justice had, an express enactment to that effect was passed: Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), s. 26. It would be highly inconvenient to try these actions in the county court. There is no provision in the County Courts Acts for delivery of particulars of breaches, or for giving notice of the defence which is to be set up. There is no instance in the books of a patent action having been tried in the county court.

R. A. Dale, for the Plaintiff, supported the rule. The County Courts Act, 1888, s. 56, gives jurisdiction in all personal actions,

(1) 29 L. J. (C.P.) 71.

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and it lies upon the county court judge to shew that this action is excepted by the proviso. It is clearly a personal action, being an action of tort in which the plaintiff claims damages for the infringement of his right to the sole use of a new invention. Such actions were common before the statutes relating to patents. The grant of letters patent for a new invention is not a franchise within the definition in Comyns' Digest, "Franchise." The franchises described there, as well as those described in Rastall's Entries, p. 382, and Chitty's Prerogative of the Crown, "Franchise," p. 119, include only liberties to do something which the king himself could do—such as exercising rights of free warren and chase. He could not trade against his subjects; and it is to be remarked that there is no mention of patent rights among the franchises enumerated in the above authorities. There is no element in common between a franchise and a patent except that the right in both is exclusive. At all events, a patent right is not a franchise within the meaning of the proviso in s. 56 of the County Courts Act, 1888. The franchise there mentioned is intended to be ejusdem generis as "corporeal or incorporeal hereditaments, tolls, fairs, or markets," and is not intended to include a mere personal right of trading in a particular respect. There would be no inconvenience in trying patent actions in the County Court. By the County Court Act, 1888, s. 164, five judges appointed by the Lord Chancellor may make rules for regulating the practice in the county court; and, "in any case not expressly by this Act or in pursuance thereof provided for, the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters." It is submitted that the county court judges have power under that section to adopt any practice which is in force in the High Court. Sect. 164, in effect, continues the provisions of s. 78 of the earlier Act (9 & 10 Vict. c. 95), and under s. 78 it has been held that judges of the county courts might exercise the same powers of allowing parties to sue in formâ pauperis as the judges of the superior courts: *Chinn* v. *Bullen*. (1) All the matters which, as has been contended, shew that the Patents, Designs, and Trade Marks Act, 1883, intended to exclude from the jurisdiction of the

(1) 8 C. B. 447.

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county courts actions for the infringement of a patent are merely matters of practice. [He also referred to *Stuart* v. *Jones* (1).]

T. Terrell (by leave of the Court), replied.

Cur. adv. vult.

April 22. The judgment of the Court (Pollock, B., and Charles, J.) was read by

POLLOCK, B. This action was commenced in the county court of Yorkshire, holden at Halifax, against one Bairstow, for the infringement of a patent. The defendant denied the validity of the patent, and upon the case coming on for hearing the judge declined to hear it upon the ground that the Court had no jurisdiction. The plaintiff then applied to this Court for an order directing the judge to proceed with the case. The question, therefore, for our determination is, whether or no the county court has jurisdiction to try such an action where the plaintiff's title to the patent is in issue.

No instance of such an action having been tried in a county court was brought to our attention, and there are good reasons why, in practice, such action should be brought in the superior courts. The right of the Crown to grant letters patent to a person for the sole use of any art first invented by him is a part of the ancient royal prerogative. This right has been limited by the Statute of Monopolies, but the grant is founded on the common law right of the sovereign. In modern times, although the right conveyed to a subject by a patent is the same as existed in the time of James I., and an action is now, as then, maintainable by the grantee of a patent against anyone who causes him damage by an infringement, the procedure, which is necessarily peculiar in its requirements as to particulars, inspection, and other matters, has been dealt with, first by rules of court, and later by statutes. The existing Act (by which the earlier provisions have been repealed) is the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). Sects. 28 to 32 provide in detail for the procedure of "the Court" in a patent action; and by s. 117 the Court is defined as meaning, "Her Majesty's High Court of Justice in England." Hence

(1) 1 E. & B. 22.

either party, plaintiff or defendant, who is desirous of availing himself of such procedure, can do so only where the action is in that court. It was argued before us that this alone would denote such an intention on the part of the legislature that all proceedings in patent actions should take place in the High Court as to deprive the county courts of jurisdiction. We think, however, that this proposition does not exhaust the question, and that, although it is not without some weight as an argumentum ab inconvenienti, it is by no means conclusive. We must, therefore, next look to see what is the jurisdiction of the county courts. The jurisdiction of the county court is given by the original County Courts Act of 1846 (9 & 10 Vict. c. 95), s. 58, and the same language, with a variation as to pecuniary limit, occurs in the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56. By this section, "all personal actions where the debt, demand, or damage claimed is not more than 50*l*.," may be commenced in the county court. The words "personal actions" clearly include an action for the infringement of a patent; but in both of these Acts the following proviso occurs: "The Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or for any libel or slander, or for seduction, or for breach of promise of marriage"; and it was contended on behalf of the defendant that "franchise" includes the right or privilege which is granted by a patent for a new invention. The primary meaning of the word "franchise," as its origin denotes, is a freedom; but it has been used in the language of the law in a wider sense as including a liberty or privilege. In Termes de la Ley, tit. "Franchise," the only meaning given to it is "an immunity or exemption from ordinary jurisdiction." The various rights, however, which it aptly describes are dwelt upon at great length in the Digests of Viner and Comyn, and in Bacon's Abridgment; and in Blackstone's Commentaries, vol. ii. p. 7, it is said: "Franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being, therefore, derived from the Crown, they must arise from the king's

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grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various and almost infinite." In Chitty's Prerogative of the Crown, p. 119, a franchise is defined to be a royal privilege or branch of the royal prerogative subsisting in the hands of a subject by a grant from the king; and for this he refers to Finch's Law, p. 164. In Comyns' Digest, tit. "Prerogative," D 30, it is said: "The king may grant to another to have any franchise or liberty as privileges of trade"; and under the head of "Trade" (B) instances are given of grants by the king's patent for the sole printing of certain books. In *Darcy* v. *Allen* (1) the Court said, in dealing with the first question—viz., whether the said grant to the plaintiff of the sole making of cards within the realm was good or not—"Also such charter of a monopoly, against the freedom of trade and traffic, is against divers Acts of Parliament, as 9 Edw. 3, cc. 1 and 2, which for the advancement of trade and traffic extends to all things vendible, notwithstanding any charter of franchise granted to the contrary, or usage or custom, or judgment given upon such charters, which charters are adjudged by the same parliament to be of no force or effect." These words are inapplicable to the "first question," unless the Court intended to assume that the grant of the sole making of cards within the realm was a "charter of franchise"; and, although the charter of franchise mentioned in the statute cited apparently referred to charters which had been granted to corporations or towns, it seems to be a fair inference that the Court considered such charter of a monopoly as a charter of franchise; and that this would be none the less true when the monopoly answered to the description which the Court declared to be lawful—i.e., "Where any man by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm." The result of these authorities is, in our opinion, that "franchise" does include such a right as was put in issue by the proceedings in the county court. The plaintiff, however, further contended that, even assuming this to be so

(1) 11 Rep. 84.

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with reference to the general meaning of the word "franchise," the language of the exemption is such as requires that a more limited meaning should be given to it. The sentence in which it is found commences by exempting from the county court jurisdiction "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, shall be in question"; and it is said that, as these words apply to claims in respect of realty or quasi realty, the word "franchise" which follows ought to be limited in its meaning to franchises of such a character as involve the right to incorporeal hereditaments, or rights of a similar kind. This rule of construction does not seem to us to apply. It is not the case of a general word following one or more less general terms ejusdem generis, in which it may properly be said that the meaning of the subsequent general word is cut down or governed by the more particular word which precedes it. Here the category of exceptions begins by very general words, and then after the word "or" adds specific causes of action, and finally closes with "or for any libel or slander, or for seduction, or breach of promise of marriage"; so that to give proper effect to the language used the usual legal meaning of each word must be assigned to it.

Upon careful consideration of all these grounds of argument, we have arrived at the conclusion that the view acted upon by the county court judge was correct; and this rule must be discharged with costs.

Rule discharged.

Solicitors for applicant: *Ford & Ford, for C. T. Rhodes, Halifax.*

Solicitor for county court judge and the defendant: *J. H. Bridgford, for W. H. Boocock, Halifax.*

W. A.

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2. —— *Award—Costs—Submission—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 2, 25.] By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act," one of which (i.) is that "the costs of the reference and award shall be in the discretion of the arbitrators or umpire," and by s. 25 the Act "shall apply to any arbitration commenced after the commencement of this Act (i.e., after January 1, 1890) under an agreement or order made before the commencement of the Act (i.e., before January 1, 1890)."—In an arbitration held after January 1, 1890, pursuant to a submission entered into before that date, which did not give power to award costs, costs were awarded by the arbitrators:—*Held*, that s. 2 referred only to submissions made subsequently to the commencement of the Act, and that the word "arbitration" in s. 25 referred to the procedure of in an arbitration as distinguished from the submission, and that the arbitrators had therefore no power to award costs. IN RE AN ARBITRATION BETWEEN WILLIAMS AND STEPNEY - - - **700**

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BANK OF ENGLAND—*Mandamus—List of Stock transferred to National Debt Commissioners—Inspection of—Applicant without bonâ fide Interest—National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 52.] By s. 52 of the National Debt Act, 1870, the Bank of England are directed to keep a list of unclaimed stock, transferred to the National Debt Commissioners, which list is to be "open for inspection at the usual hours of transfer."—Upon an application for a mandamus to compel the Bank to allow inspection of the list to the applicant, who carried on business as a "next of kin and unclaimed money agent," and desired inspection in order to make a copy of the list for the purposes of his business:—*Held*, that inasmuch as the applicant did not shew that he, bonâ fide, claimed an interest in any unclaimed stock, either on his own behalf, or as representing some other person, he was not entitled to inspection of the list, under s. 52. THE QUEEN *v.* THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND 785

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BANKRUPTCY—*continued.*
bankruptcy is subsequently annulled, such rejection remains valid, and the claim for the amount sought to be proved for is consequently barred.—A judgment had been signed by consent for the amount of an alleged simple contract debt. The judgment debtor being adjudicated bankrupt, the judgment creditor claimed in the bankruptcy, not upon the judgment, but upon the simple contract debt. The trustee in bankruptcy rejected his proof on the ground that there was no debt due, and he did not appeal. The bankruptcy was subsequently annulled:—*Held*, that the judgment creditor could not, after annulment of the bankruptcy, enforce the judgment. BRANDON *v.* MCHENRY - - - C. A. 538

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BILL OF SALE—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Hiring and Purchase Agreement.*] In an action for trespass to the plaintiff's goods it appeared that the plaintiff having applied to the defendants for a loan of 30*l.* on a bill of sale, the defendants made an inventory of his effects, but recommended him not to take a bill of sale, but to arrange with his landlord to put in a friendly distress, in which case they would buy the goods from the broker. The plaintiff assented, and, the distress having been put in, signed a memorandum requesting the broker to sell the goods to the defendants at the condemned price, and the defendants thereupon paid the broker 29*l.* 5*s.*, and obtained a receipt from him for this sum. The plaintiff afterwards, by arrangement with the defendants, brought his wife to their office, where a hiring and purchase agreement from the defendants to her was produced for her signature. On reading the document the plaintiff objected to paying what amounted to 50*l.* for an advance of 29*l.* 5*s.*; on which the defendants' representative said, "You can please yourself; we have bought the goods, and you know whether they are worth 50*l.* or not." The plaintiff, "seeing," as he said, "how he was placed," told his wife to sign the agreement, which she did; and he signed another document, guaranteeing the due payment of the instalments. By the terms of the hiring and purchase agreement the hirer was to pay the defendants 1*l.* 8*s.* a month till 50*l.* was paid, was to pay all rent in respect of the house in which the goods were, and, in case the hirer should make default in the payment of any money payable under it, it was to be lawful for the defendants to enter the house and take possession of the goods. The plaintiff afterwards made default in the payment of the rent, and the defendants entered the house under the hiring and purchase agreement, and seized the goods in question:—*Held*, by Cave, J., that the transaction was in effect a sale by the plaintiff to the defendants, subject to a right of repurchase on the terms which would have been imposed in the case of a mortgage; but that, whether it was a sale or a mortgage, neither the receipt nor the hiring and purchase agreement required registration under the Bills of Sale Acts, and that the defendants were therefore entitled to judgment. BECKETT *v.* TOWER ASSETS COMPANY. [*See next case*] - - - - C. A. 1

2. —— *Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 9—*Hiring and Purchase Agreement.*] The plaintiff, being in want of money and in arrear with his rent, applied to the defendants for a loan on the security of goods. It was arranged between them that he should get his landlord to put in a friendly distress for the rent, and that the defendants should purchase the goods distrained from the broker. A distress was accordingly put in. The goods distrained, which, by agreement between the parties, included the tools of the plaintiff's trade, and which were found by the jury to be worth 63*l.*, were appraised at 29*l.* 5*s.* The plaintiff signed a memorandum requesting the broker to sell the goods at the condemned price to the defendants, there being an understanding that a hiring and purchase agreement should afterwards be made, by which the plaintiff should be entitled to repurchase the goods on terms to be fixed by such agreement. The defendants thereupon paid to the broker the sum of 29*l.* 5*s.* A hiring and purchase agreement was subsequently executed, by which the defendants purported to let the goods to the plaintiff's wife on the terms that certain monthly instalments should be paid by the hirer until the total amount of 50*l.* was paid, and that the defendants should have power to seize the goods for default in performance of the terms of the agreement by the hirer. The defendants subsequently seized the goods for such default. The plaintiff brought an action in respect of such seizure:—*Held* (reversing the judgment of Cave, J.), that the true inference of fact from the arrangement made between the parties and the whole of the circumstances was that the parties really intended that there should be in form a sale of the goods under the distress, but that the beneficial interest in the goods should not pass to the defendants until a hiring and purchase agreement was executed, and that t il

BILL OF SALE—*continued.*
then there was a trust in favour of the plaintiff; that, under the above circumstances, the defendants had not a title to the goods independently of the hiring and purchase agreement; that such agreement amounted to a bill of sale within the Bills of Sale Act, 1882, and, not being registered, was void; and that, therefore, the plaintiff was entitled to succeed. BECKETT *v.* TOWER ASSETS COMPANY - - - - **C. A. 638**

3. —— *Attesting Witness, Address and Description of—Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Form in Schedule, Deviation from.*] The form in the schedule to the Bills of Sale Act, 1882, requires the address and description of the witness attesting the execution of a bill of sale by the grantor to be given. A bill of sale had two attestation clauses, attesting the execution of the instrument by different grantors respectively. The signature to both clauses was the same, and in one of them the address and description of the attesting witness were given, but in the other they were not. An irresistible inference, in the opinion of the Court, arose from what appeared on the face of the bill of sale that the witness in the two attestation clauses was the same person:—*Held* (reversing the judgment of the Queen's Bench Division), that the bill of sale sufficiently complied with the form. BIRD *v.* DAVEY - - - **C. A. 29**

4. —— *Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Statutory form—Equal Monthly Payments for Interest.*] A bill of sale, dated September 26, 1887, after witnessing that the mortgagor, in consideration of 50*l.*, assigned to the mortgagee the scheduled chattels by way of security for the payment of the sum of 50*l.* and interest thereon at the rate of 5 per cent. per month, proceeded as follows: "And the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid with the interest then due as follows: The sum of 2*l.* 10*s.* on October 26, 1887, and the like sum of 2*l.* 10*s.* on the 26th of each and every succeeding month thereafter until September 26, 1889; then the balance and interest as aforesaid is to be paid":—*Held*, that the scheme of the bill of sale clearly was that the principal sum of 50*l.* should be repaid at the end of two years, and that the sum of 2*l.* 10*s.* should be paid monthly as interest at the rate of 5 per cent. per month in the meantime; and that, so construed, the bill of sale was in accordance with the form given in the schedule to the Bills of Sale Act, 1882.—*Goldstrom* v. *Tallerman* (18 Q.B. D. 1) discussed. EDWARDS *v.* MARSTON - **C. A. 225**

5. —— *Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 3—*Absolute Assignment of Chattels—Hiring Agreement—Substance of Transaction to be looked at, notwithstanding Form—Estoppel.*] The plaintiff executed a deed, by which he assigned chattels absolutely to the defendants, and a hiring agreement, by which he hired the chattels from the defendants. These documents did not represent the real transaction between the parties, their intention being merely to create a security for money. The documents were not registered as required by the Bills of Sale Acts. The defendants having seized the

BILL OF SALE—*continued.*
goods for breach of the conditions of the hiring agreement, the plaintiff brought an action against them in respect of such seizure:—*Held*, that the Court must disregard the form, and look to the true nature of the transaction; that the documents amounted to a bill of sale within the Bills of Sale Act, 1882, and were void for want of registration; and that the plaintiff, therefore, was entitled to maintain the action.—*In re Watson* (25 Q. B. D. 27) followed. MADELL *v.* THOMAS & Co. - - - - - **C. A. 230**

6. —— "*Marriage Settlement*"—*Agreement for—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.] By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer . . . . and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels . . . . shall be conferred, but shall not include . . . . 'marriage settlements'":—*Held*, that a memorandum of agreement for a marriage settlement, although informal and not under seal, was a "marriage settlement" within the exception in s. 4, and not a "bill of sale." WENMAN *v.* LYON & Co. - - - - - **634**

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—— *Gray* v. *Carr* (Law Rep. 6 Q. B. 522) considered - - - - 283 *See* SHIP. 4.

—— *Knight* v. *Whitmore* (53 L. T. (N.S.) 233) followed - - - - 400 *See* FRIENDLY SOCIETY.

—— *Mogg* v. *Clark* (15 Q. B. D. 82) followed 57 *See* METROPOLIS.

—— *Needham* v. *Bowers* (21 Q. B. D. 436) distinguished - - - - 585 *See* REVENUE. 6.

—— *Netherseal Colliery Co.* v. *Bourne* (14 App. Cas. 228) followed - - - 496 *See* MINE.

—— *O'Neil* v. *Clason* (46 L. J. (Q.B.) 191) overruled - - - - - 304 *See* PRACTICE. 9.

—— *Palliser* v. *Gurney* (19 Q. B. D. 519) approved and followed - - - 661 *See* HUSBAND AND WIFE. 3.

—— *Pollexfen* v. *Sibson* (16 Q. B. D. 792) overruled - - - - - 304 *See* PRACTICE. 9.

—— *Rhodes* v. *Forwood* (1 App. Cas. 256) distinguished - - - - 544 *See* CONTRACT.

—— *Russell* v. *Cambefort* (23 Q. B. D. 526) followed - - - - 304 *See* PRACTICE. 9.

—— *Russell* v. *Niemann* (17 C. B. (N.S.) 163) considered - - - - 283 *See* SHIP. 4.

—— *United Kingdom Mutual Steamship Assurance Association Limited* v. *Nevill* (19 Q. B. D. 110) considered - 370 *See* INSURANCE. 2.

—— *Watson, In re* (25 Q. B. D. 27) followed 230 *See* BILL OF SALE. 5.

—— *Wilkenson* v. *Verity* (Law Rep. 6 C. P. 206) considered - - - - 468 *See* LIMITATIONS, STATUTE OF.

CHARGING ORDER—Solicitor—Lien — Money paid into Court—Claim and counterclaim - - - - - 774 *See* SOLICITOR. 2.

CHARTERPARTY—Demurrage—Fixed number of lay-days—Delay occasional by strike—Inability to perform ship's share of unloading - - - - 35 *See* SHIP.

—— Advance freight to be paid "if required"—Requirement first made after loss of cargo—Liability of charterer - 42 *See* SHIP. 2.

—— Cesser clause - - - - - 625 *See* SHIP. 7.

—— Advance freight to be paid "if required"—Requirement first made after loss of cargo—Liability of charterer - 742 *See* SHIP. 3.

CHEQUE—*Words prohibiting Transfer—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 73, 76.] By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 8, when a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.—The defendant drew a cheque, payable to the order of M., for 450*l.*, and crossed it "Account of M., National Bank," and gave it to M., who indorsed it to the National Bank, the plaintiffs:—*Held* (affirming the judgment of Day, J.), that the plaintiffs were entitled to recover upon the cheque, for it contained no words prohibiting transfer, or indicating an intention that it should not be transferred.—*Semble*, that a bill expressed to be payable to order cannot be made not transferable under s. 8; but, assuming that it can, the intention to prohibit transfer must be more clearly expressed than in the present case.—*Semble*, a cheque payable to order or to bearer cannot be made not negotiable except by crossing it in manner provided by s. 76. NATIONAL BANK *v.* SILKE - - - - **C. A. 435**

CHILDREN, CUSTODY OF—Illegitimate child—Rights of mother—Habeas corpus 194 *See* PRACTICE. 5.

CLERGYMAN—Chaplain to workhouse—Assignment of salary—Public policy - 594 *See* ASSIGNMENT.

COAL MINE—Wages—Payment by weight of mineral - - - - 496 *See* MINE. 2.

COKE—Loading or unloading coal—Streets—Obstruction - - - - 790 *See* METROPOLIS. 3.

COLLEGE—Income tax — Necessary officer of collegiate body—Bursar - - 567 *See* REVENUE. 4.

CONDITIONS PRECEDENT — Apprenticeship deed—Independent covenants - 431 *See* APPRENTICE. 2.

CONFLICT OF LAWS—*Foreign Power of Attorney—Mode of Arriving at Construction—Translation and Expert Evidence—Intention that Power should be acted on in England—Extent of Authority in Transactions in England.*] The plaintiff, a Brazilian subject, executed in Brazil in the

CONFLICT OF LAWS—*continued.*

Portuguese language a power of attorney to a broker resident in London to buy and sell shares. The broker accordingly sold certain shares of the plaintiff in the defendant company, and they were registered in the names of the purchasers. The plaintiff claimed a rectification of the register, on the ground that the sale was not authorized by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or by English law:—*Held*, that the intention of the plaintiff was to be ascertained by evidence of competent translators and experts, including if necessary, Brazilian lawyers, and that if, according to such evidence, the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law. CHATENAY *v.* BRAZILIAN SUBMARINE TELEGRAPH COMPANY - - - - - **C. A. 79**

CONTRACT—*Principal and Agent—Contract to employ for Time certain—Impossibility of Performance—Implied Condition.*] The defendant, a shirt manufacturer, by contract in writing, agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant as agent, canvasser, and traveller on the terms—first, that the agency should be determinable by either party at the end of five years by notice; secondly, that the plaintiff should do his utmost to obtain orders for and sell the various goods "manufactured or sold by the defendant as should from time to time be forwarded or submitted by sample or pattern to T." And it was further provided that the plaintiff should be remunerated by such commission as was specified in the contract. After about two years the defendant's manufactory was burnt down, and he did not resume business, and thenceforth did not employ the plaintiff, who brought an action for damages for breach of contract:—*Held*, by the Court of Appeal, reversing the decision of Grantham, J., that the action was maintainable, and that the plaintiff was entitled to substantial damages, for the defendant, having agreed to employ the plaintiff for five years, did not fulfil that agreement unless he sent him a reasonable amount of samples to enable him to earn his commission; and that the defendant was not excused from fulfilling his agreement by the destruction of his manufactory by fire.—*Rhodes* v. *Forwood* (1 App. Cas. 256) distinguished. TURNER *v.* GOLDSMITH - - - - **C. A. 544**

2. —— *Joint Contractors—Married Woman a Joint Contractor—Judgment against other Joint Contractor—Res Judicata.*] The rule that judgment recovered against one of two joint contractors is a bar to an action against the other applies equally when one of the joint contractors is a married woman contracting in respect of her separate property. HOARE *v.* NIBLETT - **781**

CONVICTION—Bar to remedy by action—Officer of friendly society—Misappropriation
See FRIENDLY SOCIETY. [400

CORPORATION—Indenture of apprenticeship with corporation—Legality - 75
See APPRENTICE.

CORPORATION—*continued.*

—— Libel—Corporation charged with corruption
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—— Income Tax—Municipal corporation—Gas works—Supply of gas to private consumers - - - - **575**
See REVENUE. 5.

COSTS—Refresher to counsel—Hearing of cause after return day—Adjournment of trial for want of time—Higher scale of costs
See COUNTY COURT - - [110

—— Security for—New trial, motion for—Court of Appeal - - - **224**
See PRACTICE. 8.

—— Higher and lower scale—"Sum recovered"
See COUNTY COURT. 2. [349

—— Higher scale—Appeal—Discretion of judge—Special grounds - - [531
See PRACTICE. 17.

—— Action for infringement of dramatic copyrights—Recovery of less than 10*l.*—Right of plaintiff to indemnity or costs
See PRACTICE. 21. [652

—— Arbitration—Award—Arbitration Act, 1889 (52 & 53 Vict. c. 49)—Time of coming into operation - - - **700**
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COUNTER-CLAIM—Default of pleading—Judgment, motion for - - **221**
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COUNTY—Division—Police district—Control 53
See LOCAL GOVERNMENT. 2.

COUNTY COUNCIL—*Election as Member—Women, Incapacity of—Lapse of Twelve Months—Disqualification—Penalties for acting when disqualified—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 41, 73—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 2, 75.] By s. 41 of the Municipal Corporations Act, 1882, it is provided that, if any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding 50*l.*, recoverable by action. Sect. 73 of the same Act provides, that every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a quo warranto, shall be deemed to have been to all intents a good and valid election.—The above provisions are incorporated by the Local Government Act, 1888, in reference to county councils.—The defendant, a woman, having been elected a member of a county council, twelve months elapsed without any proceedings taken to question the validity of her election. After the expiration of the twelve months, she acted on several occasions as a member of the council:—*Held*, affirming the decision of Day, J., that the defendant was liable to the penalties imposed by s. 41 for acting when disqualified.—Query, whether s. 73 applies to the election of a person whose status is one of absolute incapacity for election, as in the case of a woman. DE SOUZA *v.* COBDEN - **C.A. 687**

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—— Certified Industrial School—Poor-rate 330
See POOR-RATE. 4.

—— Borough rates—Costs of Quarter Sessions and Petty Sessions - - 389
See LOCAL GOVERNMENT. 3.

—— Borough rate—Costs of Quarter Sessions and Petty Sessions - - 725
See LOCAL GOVERNMENT. 4.

COUNTY COURT—*Costs—Refresher to Counsel—Hearing of Cause after Return Day—Adjournment of Trial for Want of Time—Higher Scale of Costs—Item* 78.] Where a cause in a county court, to which the higher scale of costs applies, is not reached on the day fixed for the hearing, and such cause consequently stands in the list for hearing on more days than one, it must be taken to have been "adjourned for want of time," and the judge has jurisdiction under Item 78 of the scale to allow a refresher to counsel of the amount therein specified. HEAP *v.* PEART 110

2. —— *Costs—Higher and Lower Scale—"Sum Recovered"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 118—*The County Court Rules*, 1889, *Appendix.*] When the sum claimed in an action in a county court exceeds 10*l.* and the sum recovered is less than 10*l.*, though the costs as between party and party must, under the County Courts Act, 1888, s. 118, and the County Court Rules, 1889, be taxed on the lower scale prescribed by the rules, the taxing officer has a discretion to allow a larger amount of costs as between solicitor and client, but not exceeding the amount fixed by the higher scale prescribed by the rules. *In re* LANGLOIS & BIDEN C.A. 349

3. —— *Jurisdiction—Action for Infringement of Patent—Franchise—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.] The grant of letters patent for the use of a new invention is a "franchise" within the meaning of the proviso in s. 56 of the County Courts Act, 1888; so that the county courts have no jurisdiction to try an action for the infringement of a patent where the validity of the patent is in dispute. THE QUEEN *v.* COUNTY COURT JUDGE OF HALIFAX - 793

—— Appeal—Notice of motion—Service of—Service upon London agent of country solicitor - - - - 97
See PRACTICE.

—— Appeal—Extension of time for entering the appeal - - - - 347
See PRACTICE.

COUNTY VOTE—Ownership list—Power of revising barrister to amend - 256
See PARLIAMENT.

—— Freehold qualification—Claim of members of chapter to vote in respect of a share in the freehold lands of chapter - 267
See PARLIAMENT.

COVENANT—Covenant not to assign—Forfeiture—Relief - - - - 417
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—— Apprenticeship deed—Condition precedent
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—— Payment of rent—Proviso for re-entry—Construction - - - 597
See LANDLORD AND TENANT.

CRIMINAL LAW—*Misappropriation by Agent—Acceptance of Bill of Exchange—Bill incomplete at time of delivery to Agent—Security for Payment of Money*—24 & 25 *Vict. c.* 96, *s.* 75.] The prosecutors, being desirous of raising money on their acceptances, entered into an agreement in writing with the prisoner, that he should draw bills on them up to a certain amount, and that they should accept the bills; that the prisoner should then endeavour to get the bills discounted; and that, in the event of his succeeding in so doing, he should pay them a certain proportion of the proceeds, or, upon failure to get them discounted within a certain time, should return the bills to them. In pursuance of this agreement the prisoner drew two bills of exchange upon the prosecutors, who accepted them and handed them back to the prisoner. At the time the bills were so handed back to the prisoner the drawer's name had not been inserted; but in other respects they were then complete bills of exchange. The prisoner subsequently completed the bills by the insertion of a drawer's name, and succeeded in getting them discounted, but in breach of his written agreement with the prosecutors, converted the whole of the proceeds to his own use:—*Held*, that the acceptances at the time of their delivery by the prosecutors to the prisoner were "securities for the payment of money" within the meaning of 24 & 25 Vict. c. 96, s. 75. THE QUEEN *v.* BOWERMAN - - - - - 112

2. —— *Extradition—Offence of a Political Character—Jurisdiction to review Decision of Magistrate—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 3 (1).] By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." *Held*, that the true meaning of this expression is that suggested in Sir James Stephen's History of the Criminal Law, vol. ii., p. 71, and therefore that to bring an offence within the meaning of the words "of a political character," it must be incidental to and form part of political disturbances. A number of the citizens of one of the cantons of the Swiss Republic, being dissatisfied with the administration of the government of the canton, rose against the Government, arrested several members of the Government, seized the arsenal, from which they provided themselves with arms, attacked, broke open, and took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some members of the Government, and established a provisional government. On entering the municipal palace the prisoner, who had taken an active part in the disturbance throughout, shot with a revolver and killed a member of the Government. He escaped to England, where he was arrested and committed for extradition on a charge of murder.—On a motion for habeas corpus:—*Held*, that the offence which the prisoner had committed was incidental to and formed a part of political disturbances, and therefore was an offence of a political character within the meaning of the statute, and the prisoner could not be surrendered, but was entitled to be discharged from custody.—The decision of a magistrate, who commits a prisoner for extradition, that the offence charged is not of a political character,

CRIMINAL LAW—*continued.*
is subject to review by the Court on an application for habeas corpus. IN RE CASTIONI - 149

3. —— *Indictable Misdemeanour—Attempt to pervert the Course of Justice—Preparing False Evidence to be used in Arbitration.*] The defendant was tried and convicted upon a count of an indictment alleging, in substance, that by the terms of a contract for the purchase of a cargo of wheat, to be shipped by the sellers from a port in the Black Sea to the buyer at the port of Bristol, it was provided that any dispute arising under the contract should be referred to two arbitrators, whose award should be final and conclusive, and might, upon the application of either contracting party, be made a rule of Court in England; that the defendant was appointed by the sellers to take samples of the cargo upon the arrival of the ship at Bristol; that such samples were then taken, and placed in bags sealed with the seals of the buyer and seller of the cargo, in accordance with the custom of merchants at the port, and for the purpose of being used as evidence before the arbitrators in case any arbitration was had under the contract; that the defendant afterwards, intending to deceive the arbitrators to be appointed under the contract, and wrongfully to make it appear to them that the bulk of the cargo was of better quality than it really was, so as to pervert the due course of law and justice, unlawfully and designedly removed the contents of the sealed bags and altered their character, and returned to the bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the cargo, and that afterwards the defendant forwarded the samples so altered to the London Corn Trade Association, with intent that the same should be used as evidence before such arbitrators, and thereby to injure and prejudice the buyer, and to pervert the due course of law and justice:—*Held*, that the count stated an indictable misdemeanour at common law. THE QUEEN *v.* VREONES - - - - 360

4. —— *Indictment—Parliament—Registration—Duties of Overseer—Misconduct—Indictable Misdemeanour—Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 51.] An offence by an overseer, within the meaning of s. 51 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), is not an indictable misdemeanour. THE QUEEN *v.* HALL - - - - 747

DEFAMATION—*Libel—Corporation charged with Corruption—Imputation of Misconduct of which Corporation incapable—Whether Actionable.*] In an action for libel brought by a corporation, the statement of claim complained that the defendant had charged the plaintiffs with corrupt practices. It contained no allegation that the plaintiffs had suffered any special pecuniary damage in consequence of such imputation:—*Held*, that, inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action. MAYOR, &C., OF MANCHESTER *v.* WILLIAMS - - - - - 94

DEFAMATION—*continued.*

2. —— *Slander—Privileged Occasion—Meeting of Poor Law Guardians—Presence of Reporters at Meeting.*] At a meeting of a board of guardians, of which the plaintiff had been the clerk, the defendant, a member of the board, in the course of a discussion concerning the plaintiff's accounts, made certain defamatory statements concerning the plaintiff, without malice and bonâ fide believing that what he said was true. In accordance with the regular custom of the board, reporters were present at the meeting:—*Held*, that the privilege which would have attached to the statements, if made in the presence of guardians only, was not taken away by the presence at the meeting of reporters or persons other than guardians. PITTARD *v.* OLIVER - C. A. 474

3. —— *Libel—Publication—Letter copied by Clerk—Letter addressed to Partnership Firm—Privileged Occasion.*] In an action for libel it appeared that the alleged libel was contained in a letter respecting the plaintiffs, two of the members of a partnership, written on behalf of the defendants, a limited company, and sent by post in an envelope addressed to the firm. The writer did not know that there were other partners in the firm. The letter was dictated by the managing director of the defendants to a clerk, who took down the words in shorthand, and then wrote them out in full by means of a type-writing machine. The letter thus written was copied by an office-boy in a copying-press. When it reached its destination, it was in the ordinary course of business opened by a clerk of the firm, and was read by two other clerks:—*Held* (reversing the judgment of Day, J.), that the letter must be taken to have been published both to the plaintiffs' clerks and the defendants' clerks, and that neither occasion was privileged. PULLMAN *v.* WALTER HILL & CO. - - - C. A. 524

DEMURRAGE—Delay occasioned by strike—Fixed number of lay-days—Inability to perform ship's share of unloading 35
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DEVIATION—Ship—"Necessity" - - 605
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DISCHARGE—Bankruptcy—Power to reconsider absolute refusal of order of discharge
See BANKRUPTCY. [463

DISCOVERY—Several defendants—Deposit of 5*l.*
See PRACTICE. [459

EDUCATION—*School Board—Vacancy of Office of Member—"Punishment with Imprisonment for Crime"—Conviction by Court of Summary Jurisdiction under Criminal Law and Procedure (Ireland) Act*, 1887—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *Sched. II., Part. I.*, *r.* 14.] A member of an English school board was imprisoned in Ireland by a Court of Summary Jurisdiction under the Criminal Law and Procedure (Ireland) Act, 1887, for "unlawfully taking part in a criminal conspiracy to interfere with the administration of the law" in a proclaimed district in Ireland:—*Held*, that the member had been "punished with imprisonment for a crime" within the meaning of rule 14 of

EDUCATION—*continued.*
Sched. II., Part I., to the Elementary Education Act, 1870, and that his office was in consequence vacant. CONYBEARE *v.* THE LONDON SCHOOL BOARD - - - - - - - 118

ELECTION—Municipal corporation—Councillor—Qualifications—Joint occupation of premises - - - - 694
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EMPLOYER AND WORKMEN—Truck Acts—"Otherwise engaged in manual labour"—Guard of a goods train - - 601
See MASTER AND SERVANT.

ESTOPPEL—Bailment—Jus tertii - 318
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EXECUTOR AND ADMINISTRATOR—Separate estate—Death of wife—Legal personal representative—Extent of liability 491
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EXTRADITION—Offence of a political character—Jurisdiction to review decision of magistrate - - - - 149
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FALSE IMPRISONMENT—Evidence of implied authority—Public house—Manager of bar - - - - - - 516
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FORCIBLE ENTRY—Removing roof of house—Injury to furniture—Action of trespass
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FOREIGN LAW—Power of attorney—Translation and expert evidence - - 79
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FORFEITURE—Relief—Covenant not to assign
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FRAUD—Principal and agent—Agent bribed to induce principal to enter into contract with briber—Recovery of bribes from agent—Subsequent action against briber
See PRINCIPAL AND AGENT [168

FRIENDLY SOCIETY — *Misappropriation by Officer—Conviction under Statute—Imprisonment for Default of Payment—Conviction and Punishment a Bar to Remedy by Action—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 16, *sub-s.* 9.] The defendant, an officer of a friendly society, was charged under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 16, sub-s. 9, with misappropriation of money, and an order for payment was made. He made default in complying with the order, and was imprisoned for two months, under the same section. The plaintiffs, the trustees of the society, sued to recover the amount which the defendant ought to have paid:—*Held*, that, as the plaintiffs had availed themselves of the remedy provided by statute, and the defendant had been convicted and punished under the proceedings so taken, such conviction and punishment was a bar to the plaintiffs' remedy by action. *Knight* v. *Whitmore* (53 L. T. (N.S.) 235) followed. VERNON *v.* WATSON - - - - - - - 400

GARNISHEE ORDER—Affidavit in support of application—Information and belief of deponent—Allegation of particular debt being due—Inquiry as to other debts
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—— Judgment debt—Action for tort to wife—Joinder of husband as co-plaintiff 509
See HUSBAND AND WIFE.

GAS WORKS—Income tax—Municipal corporation—Supply of gas to private consumers - - - - 575
See REVENUE.

HABEAS CORPUS—Appeal to Court of Appeal—Custody of children - - 194
See PRACTICE.

HIRING AGREEMENT—Bill of sale—Absolute assignment of chattels - - 230
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HIRING AND PURCHASE AGREEMENT—Bill of sale - - - - - 1
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—— Bill of sale - - - - - 638
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HOTEL—Refuse of trade—Clinkers in boilers—Metropolis - - - - 61
See METROPOLIS. 2.

HUSBAND AND WIFE—*Husband's Liability—Gift by Husband to Wife—Separate Estate—Contract binding Separate Property—Death of Wife—Devolution to Husband jure mariti—Legal Personal Representative—Extent of Liability—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 3, *s.* 23.] A husband by deed of gift settled leasehold property on his wife to her "own proper use and benefit," and the deed gave her "full power and authority to sue and give receipts." The husband died, and the wife married the defendant. After the commencement of the Married Women's Property Act, 1882, the wife borrowed money from the plaintiff. The wife died, and the defendant, without taking out administration, entered into possession of the property comprised in the deed of gift. The plaintiff sued the defendant to recover the money lent to the wife:—*Held*, that the deed made the property comprised in it the wife's separate estate; that by s. 1, sub-s. 3, of the Married Women's Property Act, 1882, such property was bound by her contract when she borrowed the money; that on her death the property passed to the defendant jure mariti, and administration was unnecessary; that the defendant was the legal personal representative of his wife within the meaning of s. 23 of the Married Women's Property Act, 1882, and therefore subject to the same liabilities as she would be subject to if living, and was therefore liable, but only to the extent of the property which had been her separate estate. SURMAN *v.* WHARTON [491

2. —— *Separate Property—Action for Tort to Wife—Joinder of Husband as co-Plaintiff—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2, *s.* 5.] In an action brought by a husband and wife as co-plaintiffs in respect of personal injuries to the wife, the

HUSBAND AND WIFE—*continued.*
jury awarded damages to the wife and a sum to the husband for expenses, and the whole amount recovered was paid into the hands of their solicitor:—*Held*, that the amount awarded to the wife was her separate property within the meaning of s. 5 of the Married Women's Property Act, 1882, and that therefore a garnishee order attaching the whole of the money in the hands of the solicitor to answer a judgment debt of the husband was invalid. BEASLEY *v.* RONEY [509

3. —— *Separate Property of Wife—Restraint on Anticipation without Words creating Separate Use—Power to bind Separate Property—Separation Deed—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 3, 4.] A married woman cannot contract so as to bind her separate property, unless she has some separate property existing at the date of the contract; but, if she has such property, her contract will bind it, and also her after-acquired separate property. *Palliser* v. *Gurney* (19 Q. B. D. 519) approved and followed. A restraint upon the alienation or anticipation of income given to a woman is of no avail unless the income is given to her for her separate use; a gift to her separate use will not be implied from the mere existence of a restraint on anticipation. *Baggett* v. *Meux* (1 Coll. 138) approved. By a separation deed between husband and wife, the husband covenanted with the trustees of the deed that he would, during the joint lives of himself and his wife, pay to the trustees an annuity of 500*l.* And it was declared that the trustees should stand possessed of the annuity, during the continuance thereof, upon trust to pay the same to the wife "for her separate use, without power of anticipation." There was a proviso that, in case the husband should at any time thereafter obtain a decree absolute for a divorce against the wife in respect of any circumstances occurring after the date of the deed, or in case the wife should at any time thereafter be proved to be leading a notoriously unchaste life, the annuity should absolutely cease and determine:—*Held*, that the separate use continued only during the joint lives of husband and wife, and that arrears of the annuity remaining unpaid at the date of the husband's death were not separate property of the wife. STOGDON *v.* LEE - - C. A. 661

4. —— *Authority of Husband—Refusal of Wife to live with Husband—Restitution of Conjugal Rights—Absence of Power to deprive Wife of Liberty.*] Where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. THE QUEEN *v.* JACKSON C. A. 671

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INCOME TAX—Company residing in the United Kingdom—Trade carried on partly in the United Kingdom, partly abroad—Profits earned abroad not remitted to the United Kingdom - - - 383
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—— Deductions—Public office or employment—Husband and wife—Joint income 560
See REVENUE. 3.

—— Corporation—Necessary offices of collegiate body—Bursar of college - - 567
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—— Municipal corporation—Gas works—Supply of gas to private consumers - 575
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INDUSTRIAL SCHOOL — Poor-rate — County council - - - - 330
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INFANT—Bill of exchange - - - 413
See BANKRUPTCY. 3.

INSURANCE—*Insurance in respect of Accident—Construction of Policy—Time, Computation of—Insurance "from" a date—"Any one Accident."*] The plaintiffs, a tramcar company, effected with the defendants an insurance against "claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from November 24, 1887," to the amount of "250*l.* in respect of any one accident." On November 24, 1888, one of the plaintiffs' tramcars was overturned, forty persons were injured, and the plaintiffs became liable to pay claims to the amount of 833*l.*:—*Held*, by the Queen's Bench Division, that the effect of "from" in the expression "for twelve calendar months from November 24, 1887," was to exclude November 24, 1887, and to include November 24, 1888, in the period of the insurance, and that the defendants were therefore liable:—*Held*, by the Court of Appeal, that "accident" in the policy meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to 250*l.*; but the plaintiffs were entitled to recover the amount of 833*l.* on the policy. SOUTH STAFFORDSHIRE TRAMWAYS COMPANY, LIMITED *v.* SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED - C. A. 402

2. —— *Marine Insurance—Mutual Marine Insurance Association—Action against Association by Person not a Member.*] The defendants, a mutual insurance association, by a policy of marine insurance in the form of a deed-poll, covenanted with a firm described therein as "a member," to pay losses upon a steamship. By the terms of the policy, the members having ships entered were to make good losses on the ship according to the provisions of the articles of association and the rules, one of which was an arbitration clause, by which the sum to be paid by the association in respect of any claim was to be settled by the committee; and the member, if he agreed to accept the amount so settled, was to be entitled to payment according to the mode of payment customary in the association; and, in case of difference, the matter in dispute was to be decided by arbitrators to be appointed by the committee and the member, the obtaining of a decision from whom was to be a condition precedent to the right

INSURANCE—*continued.*
of the member to maintain an action on the policy. The memorandum of association stated that the association was established for the "insurance of ships of members, and of ships which the members may be authorized to insure in their own names." The articles of association provided that "every person who, on behalf of himself or any other person or persons, insures or enters for protection any ship . . . . shall as from the date of the commencement of such insurance or protection be deemed to have become a member of the association;" and that "all claims in respect of insurance or protection shall be made and enforced against the association only, and not against any member thereof; but the association shall not be liable to any member or other person for the amount of any loss, claim, or demand except to the extent to which the association is able to recover from the members or persons liable for the same." The plaintiffs, who were part-owners of the steamship insured, brought an action on the policy in their own names against the defendants to recover a loss on the vessel:—*Held*, by Wright, J., that the action was not maintainable, as the terms of the policy expressly excluded liability on the part of the defendants to any person other than the firm therein described as "a member."—*United Kingdom Mutual Steamship Assurance Association, Limited*, v. *Nevill* (19 Q. B. D. 110) considered. MONTGOMERIE *v.* UNITED KINGDOM MUTUAL STEAMSHIP ASSOCIATION - - - 370

INSURANCE (MARINE)—Discovery—Order for production (underwriters)—Post office—Marine risk - - - 557
See PRACTICE. 20.

JOINT CONTRACT—Judgment against joint contractor—Husband and wife - 781
See CONTRACT. 2.

JUDGMENT, MOTION FOR—Counter-claim—Default of pleading - - - 221
See PRACTICE. 7.

JURISDICTION — Bankruptcy — Administration in bankruptcy of estate of deceased insolvent debtor—Debtor resident abroad
See BANKRUPTCY. [143

JUS TERTII—Estoppel—Bailment - 318
See BAILMENT.

JUSTICES — *Practice — Jurisdiction of Court to hear Appeal against Exercise of Summary Jurisdiction*—20 & 21 *Vict. c.* 43, *s.* 2.] The Court has not jurisdiction to hear an appeal against a decision of justices by way of a case stated under 20 & 21 Vict. c. 43, s. 2, unless the appellant has given the respondent a notice in writing of the appeal together with a copy of the case, before transmitting the case to the Court. EDWARDS *v.* ROBERTS - - - - - 302

2. —— *Practice—Application to state Case—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.] By the Summary Jurisdiction Rules, 1886, r. 18, an application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing. . . .—The appellant having been convicted by a court of summary jurisdiction, consisting of five justices, made an application in writing for a case to two only of such justices, who stated and signed the case:—*Held*, that the appellant had not complied with the directions of the rules under s. 33, and that there was consequently no power to state the case. WESTMORE *v.* PAINE - - - - - 482

LANDLORD AND TENANT—*Lease—Breach of Covenant—Right of Re-entry—Covenant not to assign without Landlord's Consent — Mistake — Forgetfulness — Equitable Relief against Forfeiture.*] In a lease for years the lessees covenanted not to underlet the premises, or any part thereof, without the consent in writing of the lessor, which consent the lessor agreed should not be arbitrarily withheld in the case of a respectable or responsible person, and power to re-enter was given to the lessor in case the lessees did not well and truly observe and perform their covenants. The lessees underlet part of the premises without obtaining or asking for the lessor's consent. The underlease was prepared by their solicitor, who omitted to look at the head lease, and forgot that it contained the covenant not to underlet without consent. Both the lessees and their under-lessees were respectable and responsible persons, and no injury was done, or likely to be done, to the lessor by reason of the underlease, nor could he have had any valid objection to it if his consent had been asked. In an action by the lessor to recover possession of the premises for breach of the covenant:—*Held*, that the omission to ask the lessor's consent was not a mistake in respect of which the Court would grant the lessees equitable relief against forfeiture for breach of the covenant, and therefore that the plaintiff was entitled to succeed in the action. BARROW *v.* ISAACS & SON
[C. A. 417

2. —— *Lease—Breach of Covenant for Payment of Rent—Proviso for Re-entry — Construction.*] A lease of a house contained a covenant by the lessee to pay rent on the usual quarter days, and a proviso for re-entry "if and whenever" any one quarter's rent should be in arrear for twenty-one days and no sufficient distress could be levied. There being three quarters' rent in arrear at Lady Day, 1890, the lessor, on April 25, 1890, distrained, and after sale of the distress there remained due more than a quarter's rent. The lessor on May 25 issued a writ for recovery of possession of the premises:—*Held*, that the effect of the words "if and whenever" in the proviso was to give the lessor a right of re-entry as often as at any moment of time the two conditions named in the proviso existed, and that as these conditions existed when the writ was issued the action was maintainable, and the plaintiff was entitled to recover possession of the demised premises. SHEPHERD *v.* BERGER
[C. A. 597

3. —— *Forcible Entry—Removing Roof of House—Injury to Furniture—Action of Trespass—Possession Warrant under* 1 & 2 *Vict. c.* 74—*Effect of.*] The plaintiff, who was tenant to the defendant of a cottage, on the expiration of his tenancy wrongfully refused to give up possession. The defendant, who was desirous of rebuilding

LANDLORD AND TENANT—*continued.*
the cottage, sent some workmen to remove the roof. In the course of such removal, which was effected without any personal violence, certain tiles and other portions of the roof unavoidably fell on to the plaintiff's furniture in the room below and damaged it. In an action for trespass and injury to the furniture:—*Held*, that the above facts disclosed no cause of action. JONES *v.* FOLEY - - - - - - 730

LANDS CLAUSES ACTS—Poor-rate—Deficiency in assessments—Liability of promoters of undertaking - - - 182
See POOR-RATE.

—— Poor-rate—Deficiency in assessments—Liability of promoters of undertaking 440
See POOR-RATE. 2.

LIBEL—Corporation charged with corruption—Imputation of misconduct of which corporation incapable - - - 94
See DEFAMATION.

—— Publication—Letter addressed to partnership firm—Letter copied by clerk—Privileged occasion - - 524
See DEFAMATION. 3.

LICENCE—Pawnbroker—Magistrate's certificate
See PAWNBROKER. [485

LICENSING ACTS—*Change of Occupation—Transfer—Grant of Licence to new Tenant under 9 Geo. 4, c. 61, s. 14—Application by same Tenant for a Second Licence under same Section—Jurisdiction of Justices.*] The tenant of a beerhouse, being duly licensed, gave up possession of the premises, and another person became tenant of the house in his stead. The new tenant applied for and obtained at a special transfer session a grant of a licence under 9 Geo. 4, c. 61, s. 14, to himself as being the "new tenant or occupier of the house having so become unoccupied." Such licence expired in the ordinary course on October 10 then next ensuing. Subsequently to the expiration of such licence, he applied at another special transfer session for a grant to him under the same section of a second similar licence to enable him to carry on the business of a beerhouse keeper until the succeeding October 10:—*Held*, that he had ceased to fill the character of "new tenant" within the meaning of the section, and that the justices had no jurisdiction to grant the licence. THE QUEEN *v.* POWELL - - 718

LIMITATIONS, STATUTE OF—*Conversion—Demand and Refusal—Lease*—21 *Jac.* 1, *c.* 16.] A lease belonging to the plaintiff was fraudulently taken from him by his son, and was deposited, without the plaintiff's knowledge, with B. in 1881 as security for the repayment of money lent by B. B. held the lease without knowledge of the fraud. B. having become bankrupt, his trustee in 1889 assigned the debt to the defendant and handed the lease over to him. Subsequently the plaintiff demanded the lease of the defendant, and upon his refusal to return it brought an action for detinue and conversion, to which the defendant pleaded the Statute of Limitations:—*Held*, that the Statute of Limitations began to run from the time when the plaintiff first had a complete cause of action against the defendant, irrespective of

LIMITATIONS, STATUTES OF—*continued.*
the question whether he had a previous cause of action against B.; that the statute, therefore, only began to run from the date of the demand and refusal, and was no answer to the action.—*Wilkinson* v. *Verity* (Law Rep. 6 C. P. 206) considered.—*Quære*, whether the original receipt of the lease by B. was sufficient evidence of a conversion by him. MILLER *v.* DELL - - C. A. 468

2. —— *Cause of Action, Accrual of—Subsidence caused by Excavation—Continuous Subsidence—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 264.] By the Public Health Act, 1875, s. 264, an action against a local authority for anything done or intended to be done or omitted to be done under the Act must be commenced within six months next after the accruing of the cause of action.—Where an excavation made by a local authority under a street, for the purpose of laying a sewer, was not properly filled in, and in consequence subsidence of the plaintiff's land with injury to houses thereon took place, which began at a period more than six months before, and went on continuously down to the commencement of an action by the plaintiff in respect of such subsidence:—*Held*, on the authority of *Darley Main Colliery Co.* v. *Mitchell* (11 App. Cas. 127), that the further subsidence, which took place within the six months before action, constituted a distinct cause of action, in respect of which the action was maintainable notwithstanding the above-mentioned enactment. CRUMBIE *v.* WALLSEND LOCAL BOARD - - - C. A. 503

LOCAL GOVERNMENT—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Unsound Meat—Possession of Unsound Meat intended for Human Food—Exposure for Sale, whether necessary to constitute Offence.*] By s. 116 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), power is given to any medical officer of health or inspector of nuisances to inspect meat "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man"; and if such meat appears to be unsound or unfit for the food of man, he may seize and carry away the same in order to have it dealt with by a justice. By s. 117 the justice may condemn the meat, if unsound or unfit for the food of man, and order it to be destroyed; "and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found," shall be liable to a penalty:—*Held*, that a person having in his possession unsound meat intended for the food of man was liable to be convicted under s. 117, notwithstanding that he had not exposed the meat for sale. MALLINSON *v.* CARR - 48

2. —— *County Council—Justices—Standing Joint Committee—Constitution of Police Districts—Police Act*, 1840 (3 & 4 *Vict. c.* 88), *ss.* 3, 27, 28—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 3, *sub-s.* 1; *s.* 9, *sub-s.* 1.] The control over the division of a county into police districts is, under the Local Government Act, 1888, vested in the Standing Joint Committee of the county. EX PARTE LEICESTERSHIRE COUNTY COUNCIL AND STANDING JOINT COMMITTEE OF COUNTY OF LEICESTER. IN RE LOCAL GOVERNMENT ACT, 1888 [53

LOCAL GOVERNMENT—*continued.*

3. —— *Borough Rate—County Fund—Costs of Quarter Sessions and Petty Sessions in Boroughs with Population of* 10,000 *or upwards having a separate Court of Quarter Sessions—Courts of Quarter Sessions and Petty Sessions in Boroughs with Population under* 10,000 *having a separate Court of Quarter Sessions—Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 169, 248, *sub-ss.* 2, 5—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 45), *s.* 35, *sub-ss.* 2, 5, *s.* 38, *sub-s.* 5, *s.* 100.] *Semble*, that under the Local Government Act, 1888, where the population of a borough having a separate court of quarter sessions is 10,000 or upwards, the expenses of quarter and petty sessions are payable out of the borough rates; where the population is less than 10,000, out of the county rates. Ex parte County Council of Kent and Council of Dover. Ex parte County Council of Kent and Council of Sandwich 389

4. —— *Transfer of Powers to County Council —Question for opinion of High Court—Right of Appeal to Court of Appeal—Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 29.] The jurisdiction of the High Court of Justice upon questions submitted to it under s. 29 of the Local Government Act, 1888, is consultative only, and not judicial, and no appeal lies from its decision to the Court of Appeal. Ex parte County Council of Kent and Council of Dover. In re Local Government Act, 1888. Ex parte County Council of Kent and Council of Sandwich. In re Local Government Act, 1888 - C. A. 725

—— Limitations, Statute of—Subsidence caused by excavation—Cause of action, account of - - - - - 503

See Limitations, Statute of. 2.

MANDAMUS—List of stock transferred to National Debt Commissioners—Inspection of—Applicant without bonâ fide interest

See Bank of England. [785

MARRIAGE SETTLEMENT—Bill of sale 634

See Bill of Sale. 6.

MASTER AND SERVANT—*False Imprisonment —Evidence of implied Authority—Public-house—Manager of Bar.*] The plaintiff and a friend went into the defendant's public-house, and the plaintiff's friend tendered in payment for some refreshment which they had a German gold ten-mark piece by mistake for a half-sovereign, and asked the barman for change. The barman went to fetch the change; but before giving it he observed that the coin was a foreign one, and took it back to the plaintiff's friend, who gave him a half-sovereign instead of it, and the barman thereupon gave him the change. The plaintiff and his friend then left the house. A person who was acting as manager of the bar in the absence of the defendant followed them into the street, and gave them into the custody of a policeman on a charge of attempting to pass bad money. In an action for false imprisonment:—*Held*, that the defendant was not liable, for that the manager had no implied authority by reason of his position to arrest the plaintiff, inasmuch as his master's property was no longer in any danger, and the arrest was made only for the purpose of vindicating the law by punishing the plaintiff for a criminal offence which he was supposed to have already committed. Abrahams *v.* Deakin [C. A. 516

MASTER AND SERVANT—*continued.*

2. —— *Truck Amendment Act*, 1887 (50 *&* 51 *Vict. c.* 46)—*Employers and Workmen Act*, 1875 (38 *&* 39 *Vict. c.* 90), *s.* 10—"*Otherwise engaged in manual labour*"—*Guard of a Goods Train.*] The plaintiff was in the employment of a railway company as guard of a goods train. His main duty was to guard and conduct the train and to marshal the trucks; but it was also part of his duty at times to assist in coupling and uncoupling the trucks and in unloading them:—*Held*, that he was not a "workman" as defined by s. 10 of the Employers and Workmen Act, 1875, and was not therefore a person to whom the provisions of the Truck Acts (1 & 2 Wm. 4, c. 37, and 50 & 51 Vict. c. 46) applied. Hunt *v.* Great Northern Railway Company - - - 601

METROPOLIS—*Metropolis Management Act* (18 *&* 19 *Vict. c.* 120), *s.* 6—*Vestryman, Qualification of—Rating—Occupation—Quo Warranto—Statutory Office.*] In order to be qualified as a vestryman under the Metropolis Management Act, 1855, s. 6, a person must both occupy hereditaments in the parish, and be rated in respect of such occupation upon the rateable value required by the section.—Therefore, where a person occupied and was rated in respect of premises of insufficient rateable value, and also was wrongly rated in respect of other premises of the required value which he did not occupy:—*Held*, that he was not qualified to be a vestryman under the Act.—*Mogg* v. *Clark* (15 Q. B. D. 82) followed.—A quo warranto information will lie in respect of the office of vestryman under the Metropolis Management Act, 1855. The Queen *v.* Soutter C. A. 57

2. —— *Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 128—*Refuse of Trade, Manufacture, or Business—Clinkers from Furnaces in Hotel.*] Clinkers produced in the furnaces of boilers belonging to an hotel, used to generate steam for the purpose of supplying power for the electric lighting, and for warming and cooking, and other purposes of the hotel, are not refuse of a trade, manufacture, or business within the meaning of the 128th section of the Metropolis Management Act, 1855, and therefore the scavengers, under s. 125 of the Act, are bound to remove them without payment.—*Gay* v. *Cadby* (2 C. P. D. 391) discussed. Vestry of St. Martin's *v.* Gordon - - - - C. A. 61

3. —— *Streets—Obstruction—Loading or Unloading Coal — Coke — Metropolitan Streets Act*, 1867 (30 *&* 31 *Vict. c.* 134), *s.* 15.] Coke is not "coal" within the meaning of s. 15 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), which prohibits the loading or unloading of "coal" on or across the footway between certain hours, and imposes a penalty for so doing. Fletcher, Appellant; Fields, Respondent 790

MINE—*Metalliferous Mines Regulation Act*, 1872 (35 *&* 36 *Vict. c.* 77), *s.* 23. *sub-s.* 10—*Offences—* "*Working Shaft*"—*Guides.*] By s. 23, sub-s. 10, of the Metalliferous Mines Regulation Act, 1872, "Every working shaft in which persons are

MINE—*continued.*
raised" shall, under certain specified circumstances, be provided with guides, and persons contravening the provisions of the section are made liable to a penalty.—The shaft of a lead mine was completed, and a tunnel driven from the bottom of it for the purpose of arriving at the ore, but no ore had been gotten. The men employed in the mine were drawn up the shaft in a bucket unprovided with guides:—*Held*, that the shaft was a "working shaft" within the meaning of s. 23, sub-s. 10, and therefore that the owners of the mine were liable to be convicted of an offence against that section. FOSTER *v.* NORTH HENDRE MINING COMPANY - - 71

2. —— *Wages—Payment by Weight of Mineral —"Actual Weight gotten of Mineral contracted to be gotten"—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 12, *sub-s.* 1—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.] By sub-s. 1, s. 12, of the Coal Mines Regulation Act, 1887: "When the amount of wages paid to any of the persons employed in a mine depends on the amount of minerals gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . . provided that nothing in the section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that reductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten."—The plaintiffs were employed in the defendants' collieries to cut large coal at wages which depended on the weight gotten. The coal raised was screened at the pit's mouth, and the defendants made deductions from the plaintiffs' wages in respect of the small coal which it was found to contain. The plaintiffs sued the defendants for the amounts so deducted:—*Held*, that the case of *Netherseal Colliery Co.* v. *Bourne* (14 App. Cas. 228), under the Coal Mines Regulation Act, 1872, applied, that the deductions were illegal under s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887, and that the plaintiffs were therefore entitled to recover. BRACE *v.* ABERCARN COLLIERY COMPANY. HUGGINS *v.* LONDON AND SOUTH WALES COLLIERY COMPANY - - - - - 496

—— Coal mine—Boiler explosion — Inquiry — Board of Trade - - - 703
See BOILER.

MISTAKE — Forgetfulness — Covenant not to assign—Forfeiture—Relief - 417
See LANDLORD AND TENANT.

MORTGAGE—Principal and surety—Giving of time—Covenant to pay mortgage debt
See PRINCIPAL AND SURETY. [278

MUNICIPAL CORPORATION—*Election as Councillor — Qualification — Occupation—Payment of Rates—Joint Occupation of Licensed Premises under Verbal Agreement—"Entitled to be enrolled as a Burgess"—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 1, *sub-s.* 2 (*b*) (*c*), *s.* 11, *sub-s.* 2 (*a*)—*Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 15, *sub-s.* 6.] On the trial of a petition against the election of the respondent to the office of town councillor, it was proved that two years before the election the respondent, with his wife, family, and furniture, moved into an inn kept by his mother, and a verbal agreement was entered into, by which the mother was to retire from the business, the respondent was to take it over, and the mother was to continue to reside in the house and have her board, lodging, and clothing free of charge. The respondent took over the entire management of the inn; but there was no assignment of the lease or transfer of the licence to the respondent, and the excise licences were still taken out in the mother's name, which remained alone over the door. The respondent requested that his name might be inserted in the rate book as joint occupier; but this was not done. The demand notes and receipts for rates during the twelve months preceding July 15 next before the election were made out in the mother's name; but the respondent paid the rates out of the profits of the inn. Before the publication of the lists next preceding the election, the respondent's name was inserted upon the burgess roll as joint occupier, his mother's name still remaining on the roll as joint occupier:—*Held*, that the respondent was qualified by occupation and payment of rates, and was therefore "entitled to be enrolled as a burgess" within the meaning of the Municipal Corporations Act, 1882, s. 11, sub-s. 2 (*a*), and was duly elected.—There is no appeal from a decision of the High Court under the Corrupt Practices (Municipal Elections) Act, 1872, except by special leave of that Court. UNWIN *v.* MCMULLEN - - - - C. A. 694

—— Borough rates — County fund — Costs of quarter sessions and petty sessions 389
See LOCAL GOVERNMENT. 3.

—— County council — Election as member — Women, incapacity of—Lapse of twelve months—Disqualification - 687
See COUNTY COUNCIL.

NEGLIGENCE—Trespass to the person—Wounding with gun—Accident—Absence of negligence—Liability - - 86
See TRESPASS TO THE PERSON.

NEW TRIAL—Stay of execution—Application to Court—Special circumstances - 346
See PRACTICE. 10.

NEW TRIAL, MOTION FOR—Security for costs —Court of Appeal - - 224
See PRACTICE. 8.

—— Motion for—Jurisdiction of Court of Appeal Power to enter judgment - - 444
See PRACTICE. 12.

NOTICE OF CLAIM—Signature—Parliament 253
See PARLIAMENT. 2.

NOTICE OF OBJECTION—Form—Place of signature—Parliament - - - 269
See PARLIAMENT. 5.

PARLIAMENT — *Registration — Borough Vote—Occupation Franchise—Effect of Bankruptcy on Occupation as Tenant—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 20—*Representation of the*

PARLIAMENT—*continued.*

People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.] A claimant in respect of the occupation of a house in a borough as a yearly tenant was adjudicated a bankrupt during the qualifying period. It appeared that the landlord, after the adjudication, had continued to receive rent from the claimant, and had allowed him to remain in undisturbed possession during the remainder of the qualifying period. The trustee in the bankruptcy had not in any way interfered:—*Held*, that the facts shewed a continuous occupation by the claimant as tenant within the meaning of s. 3 of the Representation of the People Act, 1867, and that he was entitled to be registered as a voter. MACKAY *v.* MCGUIRE - - - - - **250**

2. —— *Claims—Signature of Notice of Claim* —6 & 7 *Vict. c.* 18, *s.* 38.] The appellant gave his agent a written authority to make and sign on the appellant's behalf a claim to vote in one of the parliamentary divisions of a county, or in the administrative country, or both, as he might seem to be qualified. A notice of claim to be placed on Division I. of the occupiers' list was thereupon prepared, and signed with the appellant's name by a clerk of the agent under his direction:—*Held*, that the affixing of the signature to the notice of claim by the clerk instead of the agent did not establish that the appellant had not given due notice of his claim within 6 & 7 Vict. c. 18, s. 38. BROWN *v.* TOMBS - **253**

3. —— *Registration — County Vote—Ownership List—Description of Nature of Qualification —Power of Revising Barrister to Amend—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 24, *s.* 28, *sub-s.* 1, 12, 13 —*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 1, *sub-s.* 2.] The nature of the qualification of a person in the list of ownership claimants was described in the third column as "freehold house." The revising barrister, on proof that the claimant possessed a leasehold qualification in respect of the house in question, substituted "leasehold" for "freehold" in the third column: —*Held* (affirming the decision of the Queen's Bench Division), that the revising barrister had no power to make the alteration. PLANT *v.* POTTS [C. A. **256**

4. —— *Registration—County Vote—Freehold Qualification—Claim of Members of Chapter to Vote in respect of a Share in the Freehold Lands of Chapter*—4 & 5 *Vict. c.* 39, *s.* 25—*Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 74.] The canons residentiary of a cathedral who are entitled under 4 & 5 Vict. c. 39, s. 25, to a fixed share in the corporate revenues, have no freehold qualification in respect of shares in the freehold lands of the corporation. HARRIS *v.* PHILLIPS - - **267**

5. —— *Notice of Objection to Overseers—Form —Place of Signature—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41, *s.* 76, *sub-s.* 7)—*Registration Order*, 1889, *Sched.* 2, *Form* (1), *No.* 1; 48 *Vict. c.* 15, *s.* 18.] A notice of objection given to overseers under the Registration of Electors Acts, and the Registration Order, 1889, Sched. 2, Form (1), No. 1 is not rendered invalid by the mere fact that the signature of the objector precedes the names of the voters objected to instead of being placed after them as prescribed in the form.

PARLIAMENT—*continued.*

SUTTON *v.* WADE. GALE *v.* OVEREND. MOORE *v.* ATKINSON - - - - - **269**

—— Registration—Duties of overseers—Misconduct—Indictable misdemeanour **747**
See CRIMINAL LAW. 4.

PATENT—Action for infringement—Franchise—County court—Jurisdiction - **793**
See COUNTY COURT. 3.

PAWNBROKER — *Licence—Magistrate's Certificate—Exemption from necessity of obtaining Certificate—Pawnbrokers' Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 39.] By s. 39 of the Pawnbrokers' Act, 1872, a pawnbroker's licence is only to be granted to an applicant upon the production of a magistrate's certificate, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such certificate":—*Held*, that the exemption in favour of a pawnbroker licensed at the commencement of the Act was not confined to the business which was then actually carried on by such pawnbrokers, but was a general exemption in favour of all persons who were then licensed pawnbrokers, and that therefore after the commencement of the Act such a licensed pawnbroker, his executors, administrators, assigns, or successors, could open a new business upon payment of the licence duty without the production of a magistrate's certificate. THE QUEEN *v.* COMMISSIONERS OF INLAND REVENUE. OHLSON'S CASE. GARLAND'S CASE - - - **485**

POLICE DISTRICT—Control—County council **53**
See LOCAL GOVERNMENT. 2.

POLICE OFFICER—Residence—Poor-rate **339**
See POOR-RATE. 5.

POOR LAW—*Practice—Suspension of Order of Removal—Costs of Maintenance of Pauper during Suspension—Order for Payment of—Whether ex parte or on Summons*—35 *Geo.* 3, *c.* 101, *s.* 2—4 & 5 *Will.* 4, *c.* 76, *s.* 84.] Where an order for the removal of a pauper has been suspended in consequence of the pauper's inability to travel, an application to justices by the removing union, for an order for the payment by the union to which the pauper belongs, of the costs of his maintenance during the period of suspension, must be made upon summons and not ex parte. THE QUEEN *v.* WILKINSON - - - **722**

—— Meeting of guardians—Slander—Privileged occasion - - - - **474**
See DEFAMATION. 2.

POOR-RATE — *Deficiency in Assessments — Liability of Promoters of Undertaking—Lands Purchased in order to obtain withdrawal of Opposition of Owners to passing of Special Act—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 2, 133.] By the Lands Clauses Consolidation Act, 1845, s. 133: "If the promoters of the undertaking become possessed, by virtue of this or of the special Act, or any Act incorporated therewith, of any lands liable to be assessed to the poor-rate, they shall be liable to make good the deficiencies in the assessments to poor-rate by reason of such lands having been taken or used for the purposes of the works."—The promoters of a railway purchased houses beyond the limits

POOR-RATE—*continued.*

of deviation from the line of the railway in order to obtain the withdrawal of the opposition of the owners of such houses to the passing of the special Act:—*Held*, that the houses had been "taken for the purposes of the works" within the meaning of the section, and that the promoters were therefore liable to make good a consequent deficiency in the assessments of the houses to poor-rate. OVERSEERS OF PUTNEY *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY. [*See next case*] **182**

2. —— *Land taken by Promoters—Deficiency in Assessment—Liability of Promoters to make good Deficiency—Land vacant when taken—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 133.] By the Lands Clauses Consolidation Act, 1845, s. 133: "If the promoters of the undertaking become possessed, by virtue of this or of the special Act, or any Act incorporated therewith, of any lands charged with the land tax or liable to be assessed to the poor-rate, they shall be liable to make good the deficiencies in the several assessments for land tax or poor-rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the special Act." The promoters of a railway company purchased houses beyond the limits of deviation from the line of the railway, in order to obtain the withdrawal of the opposition of the owners of such houses to the passing of the special Act. Some of the houses were unoccupied when acquired by the promoters. On a special case stated to ascertain the liability of the promoters in respect of the deficiency in poor-rates:—*Held* (affirming the decision of the Queen's Bench Division), that, as the promoters could only hold land under the powers given them by statute, they could not be heard to say that they had become possessed of the houses otherwise than by virtue of their Acts, and that they were, consequently, liable to make good the deficiency:—*Held*, also, that as the statute directed that the deficiency should be computed according to the rental at which the houses were valued or rated at the time of the passing of the special Act, the fact that some of them were then unoccupied was immaterial in estimating the amount of the deficiency. OVERSEERS OF PUTNEY *v.* LONDON & SOUTH WESTERN RAILWAY COMPANY **[C. A. 440**

3. —— *Waterworks—Rateable Value—Money advanced out of District Rate—Repayment—Statutory Restrictions*—21 & 22 *Vict. c. xii.*] By the Merthyr Tydfil Water Act, 1858 (21 & 22 Vict. c. xii.), a local board of health was authorized to acquire waterworks, and by s. 63 all sums paid out of the general district rate under the Act were to be repaid out of any balance standing to the credit of the waterworks account, after application to the objects to which moneys carried to that account were, under the provisions of the Act, to be primarily applied, and by s. 71 all moneys received under the Act, other than money out of the district rate, or raised on mortgage), were to be applied, inter alia, in repaying any moneys advanced out of the general district

POOR-RATE—*continued.*

rate under the powers and for the purposes of the Act. In assessing the local board to the poor-rate in respect of the waterworks, a sum paid out of the general district rate for the purposes of the Act was included in the rateable value of the waterworks:—*Held*, that the sum ought not to be included in the assessment; for it was received on terms as to repayment which prevented it from being available as an item of gross profit. MERTHYR TYDFIL LOCAL BOARD OF HEALTH *v.* ASSESSMENT COMMITTEE OF THE MERTHYR TYDFIL UNION - - - - **186**

4. —— *Certified Industrial School — County Council—Liability to be rated—Industrial Schools Acts*, 1866 & 1872 (29 & 30 *Vict. c.* 118; 35 & 36 *Vict. c.* 21)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41).] The county council are rateable to the poor-rate in respect of the occupation of an industrial school established by justices under the Industrial Schools Acts, 1866 & 1872 (29 & 30 Vict. c. 118; 35 & 36 Vict. c. 21), and vested in the county council under the Local Government Act, 1888 (51 & 52 Vict. c. 41). COUNTY COUNCIL OF DURHAM *v.* ASSESSMENT COMMITTEE OF CHESTER-LE-STREET AND CHURCHWARDENS, &C., FOR PARISH OF WITTON GILBERT - - - **330**

5. —— *Beneficial Occupation—Residence of Police Officer—Rateability—Exemption of Property occupied for Public Purposes.*] The appellants, being respectively the chief constable, the deputy chief constable, and two other officers of the constabulary force of the county of Essex, occupied as residences part of a building vested, under the Local Government Act, 1888, in a joint committee of the justices of the county and the county council. The whole building was under one roof, and consisted of the chief constable's and deputy chief constable's houses, quarters for the other two officers and their families, clerks' offices, store-rooms for police clothing, a parade-room, stables, coach-house, and other outbuildings. The whole of the premises and grounds were inclosed by a wall, and were used solely by the police force for the purposes of, and were the head-quarters of, the county constabulary, the chief constable being bound to reside there as a condition of his appointment. Nothing more was provided for the accommodation of each officer than was necessary having regard to his rank in life; and each paid a rack rent for the premises occupied by him, such rent being deducted from his pay:—*Held*, affirming the judgment of the Queen's Bench Division, that the rule exempting from rateability property occupied for the purposes of the government of the country did not apply to the premises occupied by the appellants as residences, and that each of them was rateable to the relief of the poor in respect of his occupation. SHOWERS *v.* ASSESSMENT COMMITTEE OF CHELMSFORD UNION - - **C. A. 339**

6. —— *Objections to Valuation List—Assessment Committee, Procedure before—Right to appear by Agent—Union Assessment Committee Act*, 1862 (25 & 26 *Vict. c.* 103), *ss.* 18, 19—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 1, 11, 19.] By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18, any person

POOR-RATE—*continued.*
aggrieved by a valuation list may give notice of objection, and by s. 19 the assessment committee shall hold meetings for hearing objections, and "may at such meeting hear and determine such objections."—A householder objected to a valuation list, and, at the hearing before the assessment committee, did not appear personally, but was represented by another person, who claimed to be heard as his agent in support of the objections. The committee refused to hear such person, on the ground that their rule was not to hear any one other than the objector himself or a member of his family or household, or a member of the legal profession.—On an application for a mandamus to compel the committee to hear the agent:—*Held*, that, as the statute gives the objector the right to appear and be heard in support of his objections, and contains no provision prohibiting him from appearing by an agent, the committee were bound to hear the agent, and a mandamus must be granted. THE QUEEN *v.* ASSESSMENT COMMITTEE OF SAINT MARY ABBOTTS, KENSINGTON - - C. A. 378

PRACTICE—*Appeal from County Court—Notice of Motion, Service of—Sevice upon London Agent of Country Solicitor—Order* LIX., *r.* 12.] *Semble*, that in the case of an appeal from a county court where the solicitor to the respondent carries on business in the country, service of the notice of motion upon the London agent of the solicitor is not sufficient service to satisfy Order LIX., r. 12. POWELL *v.* THOMAS - - - - 97

2. —— *Renewal of Writ—Extension of Time — Statute of Limitations — Order* VIII., *r.* 1; *Order* LXIV., *r.* 7.] The rule of practice is not to extend the time for renewing a writ of summons after the expiration of the twelve months from the date of the writ, where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations:—By Kay, L.J., *semble*, however, there would be a discretion to extend the time in such a case under exceptional circumstances. *Doyle* v. *Kaufman* (3 Q. B. D. 7, 340) followed. HEWETT *v.* BARR - C. A. 98

3. —— *Substituted Service of Writ — Defendant out of Jurisdiction—Irregularity—Rules of Supreme Court*, 1883, *Order* IX., *r.* 2; *Order* X.] Where a writ was issued in the ordinary form for service within the jurisdiction against a person who shortly before the issue of the writ had left England, and had ever since remained out of the jurisdiction, and it did not appear that the defendant had gone out of the jurisdiction to avoid service of the writ:—*Held* (following *Fry* v. *Moore* (23 Q. B. D. 395)), that an order for substituted service of such writ could not be made. WILDING *v.* BEAN - - C. A. 100

4. —— *Service out of Jurisdiction—Contract "which, according to the terms thereof, ought to be performed within the jurisdiction"—Order* XI., *r.* 1 (*e*).] By Order XI., r. 1, service out of the jurisdiction of a writ of summons or notice of such writ may be allowed wherever (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.—In order that a case may come within the above provision, the contract must expressly or by implication require that performance should be within the jurisdiction. Where a foreign company chartered a ship from English shipowners to take a cargo from London to a foreign port, and by the terms of the charter-party it was stipulated that all lighterage should be at charterers' or consignees' risk and expense, the charterers indemnifying the shipowners from all lighterage on cargo at the port of discharge; but no place was specified for payment of moneys that might become payable under such contract of indemnity:—*Held*, that such contract was not one which, "according to the terms thereof," ought to be performed within the jurisdiction, within the meaning of Order XI., rule 1 (*e*), and therefore leave to serve notice of the writ out of the jurisdiction in an action upon such contract against the foreign company could not be given. BELL & CO. *v.* ANTWERP, LONDON AND BRAZIL LINE - - - - C. A. 103

5. —— *Appeal from Divisional Court — Habeas Corpus—Custody of Infant—Illegitimate Child—Rights of Mother of Illegitimate Child.*] An appeal lies from an order of the Queen's Bench Division directing the issue of a writ of habeas corpus to bring before the Court an infant, in order to determine who is entitled to have the custody of and control over such infant. In determining who is entitled to have the custody of and control over an illegitimate child the Court will, in a proper case, give the same effect to the mother's wishes in respect of the care, maintenance, and education of the child as it gives to the wishes of the father of a legitimate child in those respects. THE QUEEN *v.* BARNARDO. JONES'S CASE - - - - C. A. 194

6. —— *Garnishee Order—Affidavit in support of Application—Information and belief of Deponent—Allegation of particular Debt being Due —Inquiry as to other Debts—Order* XLV., *r.* 1.] On an application for a garnishee order the affidavit in support stated, on information and belief, that a particular debt was due from the garnishee to the judgment debtor. The garnishee, by affidavit, denied the existence of that specific debt:—*Held*, that on such an application an affidavit of information and belief is sufficient. —*Held*, also, that in such a case the inquiry is not limited to the existence of the particular debt alleged, and consequently that the garnishee might be called upon to depose that he did not owe any debt to the judgment debtor, and that, on his refusal to do so, an order absolute could rightly be made.—*Coren* v. *Barne* (22 Q. B. D. 249) approved. DE PASS *v.* CAPITAL AND INDUSTRIES CORPORATION - C. A. 216

7. —— *Counter-claim—Default of Pleading—Judgment, Motion for—Order* XXVII., *r.* 11.] Where the plaintiff fails to deliver a defence to a counter-claim, the defendant cannot sign judgment on the counter-claim for default of pleading, but must move for judgment under Order XXVII., r. 11. JONES *v.* MACAULAY - - C. A. 221

8. —— *Security for Costs—New Trial, Motion for—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1; *Order* LVIII., *r.* 15.]

PRACTICE—*continued.*

An order for security for the costs of a motion for a new trial entered in the Court of Appeal under the Supreme Court of Judicature Act, 1890, being applied for on the ground of the poverty of the party moving:—*Held*, that, inasmuch as it was not the practice in the Queen's Bench Division to order security for costs to be given in such cases before the Act, the Court of Appeal would not make such order. HECKSCHER *v.* CROSLEY - - - - **C. A. 224**

9. —— *Service of Writ—Action against Foreign Firm—Service on Person temporarily within Jurisdiction "as Partner"—Order IX., r. 6.*] A writ was issued against a partnership firm (sued by the firm name) which carried on business abroad and had no place of business in England, and all the partners in which were domiciled and resident abroad. The writ was served in England upon a person who was temporarily there, and whom the plaintiffs alleged to be a partner in the firm, he being served expressly "as partner." He entered a conditional appearance, which was, on the application of the plaintiffs, struck out as irregular, and he then entered an unconditional appearance, and, in his own name, moved to set aside the service, on the ground that he was not a partner in the defendant firm. A Divisional Court refused to set aside the service. On appeal:—*Held*, by Lord Esher, M.R., that, under r. 6 of Order IX., the service on the appellant was good service on the firm:—*Held*, by Lindley and Bowen, L.JJ., on the authority of *Russell* v. *Cambefort* (23 Q. B. D. 526), that r. 6 of Order IX. did not apply to the case of a foreign firm, and that the service was not good service on the firm; but that the service on the defendant as an individual would have been good, if he had been named in the writ, and that he had by appearing waived the irregularity.—Ordered, therefore, that, if the plaintiffs would elect to amend the writ, by stating that the appellant was sued together with the other alleged members of the firm, who were to be named separately, the service should stand as against the appellant; but, if the plaintiffs would not so elect, the writ must be set aside, with costs.—By Bowen, L.J.:—*O'Neil* v. *Clason* (46 L. J. (Q.B.) 191) and *Pollexfen* v. *Sibson* (16 Q. B. D. 792) must be treated as overruled by *Russell* v. *Cambefort* (23 Q. B. D. 526). WESTERN NATIONAL BANK OF THE CITY OF NEW YORK *v.* PEREZ, TRIANA & CO. - - - - **C. A. 304**

10. —— *New Trial—Stay of Execution—Application to Court—Special Circumstances to support Application.*] Where a stay of execution has been refused by the judge at the trial, an application made to the Court of Appeal for a stay pending an appeal must be supported by special circumstances, and allegations that there has been misdirection, that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the Court will grant the application. MONK *v.* BARTRAM - - - - **C. A. 346**

11. —— *County Court—Appeal—Extension of Time for Entering the Appeal—Order LIX., r. 16.*] On an application to extend the time for entering an appeal from a judgment of a county court, the Divisional Court refused the application on the ground that they were bound by the view expressed by the majority of the Court of Appeal in *Collins* v. *Vestry of Paddington* (5 Q. B. D. 368) as to the distinction between applications for an extension of time previous to the trial of the action and applications to extend the time for appealing after judgment, and the more stringent practice applicable to the latter cases. On appeal:—*Held*, that no such distinction or practice ought to be recognised as governing the exercise of the discretion vested in the Court. CUSACK *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - **C. A. 347**

12. —— *Motion for New Trial—Jurisdiction of Court of Appeal—Power to enter Judgment—53 & 54 Vict. c. 44, s. 1—Order LVIII., r. 4.*] The Court of Appeal has jurisdiction on a motion for a new trial under the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), to direct judgment to be entered for either of the parties, instead of ordering a new trial. ALLCOCK *v.* HALL - - - - - **C. A. 444**

13. —— *Charging Order—Application to rescind Order Absolute—1 & 2 Vict. c. 110, ss. 14, 15.*] Where a charging order nisi, under 1 & 2 Vict. c. 110, ss. 14 and 15, has become absolute, the statute gives no power to rescind it. DREW *v.* WILLIS. *Ex parte* MARTIN - - **C. A. 450**

14. —— *Joint Contractors — Judgment Recovered against One—Setting aside Judgment and adding co-Contractor as Defendant—Res Judicata.*] The plaintiffs, a firm of printers, sued the defendant for the cost of printing for him a certain newspaper of which they supposed him to be the sole proprietor. There being no defence to the action, the defendant consented to final judgment being signed against him. After judgment had been so signed, the plaintiffs received information that at the time the work was done, one T. was a partner of the defendant, and joint proprietor with him of the newspaper. They accordingly, with the consent of the defendant, applied for an order that the judgment should be set aside, and that the writ should be amended by adding T. as a defendant in the action:—*Held*, that the consent of the defendant to the setting aside of the judgment could not enable the plaintiff to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, and that there was consequently no jurisdiction to make the order. HAMMOND *v.* SCHOFIELD - - **453**

15. —— *Discovery — Several Defendants — Deposit of 5l.—Order XXXI., r. 26.*] A plaintiff who brings an action for one and the same cause against several defendants is, by Order XXXI., r. 26, entitled to discovery from all of them, on payment of one sum of 5*l.*, even although they sever in their defence. JOYCE *v.* BEALL - **459**

16. —— *Stay of Proceedings—Bankruptcy of Plaintiff—Election of Trustee in Bankruptcy not to proceed with Action—Discharge of Plaintiff—Assignment of Cause of Action by Trustee to Plaintiff—Power to remove Stay of Proceedings.*] The plaintiff in an action became bankrupt; the

PRACTICE—*continued.*

defendant applied to the trustee in the bankruptcy to know whether he would continue the proceedings in the action; the trustee having replied that he did not see his way to continue them, the defendant obtained an unconditional order in chambers for a stay of proceedings; notice of this application was given to the trustee, who took no part in the proceedings. Subsequently the plaintiff, having obtained his discharge, purchased from the trustee all the assets in the bankruptcy, and applied in chambers to have the stay of proceedings removed:—*Held*, that the plaintiff was in the same position as the trustee in bankruptcy, who in the absence of special circumstances would not have been entitled to have the stay of proceedings removed, and that the mere assignment of the cause of action by the trustee to the plaintiff was not a special circumstance entitling him to a removal of the stay of proceedings. SELIG *v.* LION **513**

17. —— *Costs—Higher Scale, Order for Costs on—Appeal—Discretion of Judge—"Special Grounds arising out of the Nature and Importance, or the Difficulty or Urgency of the Case"—False Representation, Action for.*] The jurisdiction to make an order for costs on the higher scale under Order LXV., r. 9, depends on the existence of "special grounds arising out of the nature and importance, or the difficulty or urgency of the case." Consequently, an appeal will lie against such an order on the question whether any facts existed which could constitute such special grounds.—In an action for a fraudulent misrepresentation on the sale of a public house, in which a great number of witnesses were called and the trial took seven days, the defendant having obtained the verdict, the judge who tried the case made an order giving him costs on the higher scale:—*Held*, that in such a case there were no "special grounds arising out of the nature and importance or the difficulty or urgency of the case," so as to give the judge jurisdiction to make the order. PAINE *v.* CHISHOLM **C. A. 531**

18. —— *Leave to serve Writ out of Jurisdiction—Officer on board Queen's Ship on High Seas—"Place or Country where Defendant is or probably may be found"—Order XI., r. 4.*] Upon an application for leave to serve a writ out of the jurisdiction it appeared that the defendant was a British naval officer on board a man-of-war at the Mediterranean station, which at the time of the application was on the high seas, but would touch at one or other of the coaling ports in the Mediterranean and would ultimately put into Malta, the chief port on the station:—*Held*, that it was not sufficiently shewn in what place or country the defendant "was or might probably be found," within the meaning of Order XI., r. 4, and that leave to serve the writ out of the jurisdiction must be refused. SEAGROVE *v.* PARKS. **551**

19. —— *Service of Writ—Action against Firm carrying on Business in England—One Partner domiciled and resident abroad—Service on another Partner resident within Jurisdiction—Summary Judgment against Firm—Order IX., r. 6; Order XIV., r. 1.*] Two persons, subjects of a foreign state, carried on business as co-partners in England. One of them resided in England, the other resided and was domiciled abroad. A writ having been issued against them in the name of their firm, the partner resident in England was served with such writ under Order IX., r. 6, and appeared. There being no defence to the action, judgment was entered against the firm under Order XIV.:—*Held*, that the service on the partner was a good service on the firm, and that judgment was rightly entered against the firm. LYSAGHT *v.* CLARK & Co. - - - **552**

20. —— *Discovery—Action on Policy of Insurance—Order for Production (Underwriters)—Appendix K., No. 19—Discovery before Delivery of Defence.*] By a policy of insurance goods were insured during their transit by post from Cadiz to Alexandretta, in Syria, against certain perils. The period covered by the policy was from the date of posting until delivery into the hands of the consignee; but, except that the policy covered such portion of the transit as was by land as well as the portion which was by sea, it was in the form of an ordinary Lloyds' policy. In an action on the policy by the assured, the defendants sought to obtain from the plaintiff and all persons interested in the proceedings and in the insurance the subject of the action, production of the various documents specified in the form Appendix K., No. 19, so far as they related to the subject-matter of the insurance:—*Held*, that the defendants were not entitled to discovery to the full extent of the application, but that they were entitled to discovery in the ordinary form under Order XXXI., r. 12, before defence delivered, and the time for delivering such defence was extended until after such discovery should have been given. HENDERSON *v.* UNDERWRITING AND AGENCY ASSOCIATION - **557**

21. —— *Costs—Action for Infringement of Dramatic Copyright—Recovery of less than 10l.—Right of Plaintiff to Indemnity or Costs—3 & 4 Wm. 4, c 15, s. 2—5 & 6 Vict, c. 97, s. 2—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116—*Order XXII., r. 7—Order LXV., r.* 1.] By 3 & 4 Wm. 4, c. 15, s. 2, any person who represents or causes to be represented a stage play without the previous consent of the proprietor of the right of representation is made liable for each representation to the payment of a sum not less than 40*s.* to the proprietor, together with double costs of suit. By 5 & 6 Vict. c. 97, s. 2, all enactments in public Acts as to double costs are repealed, "provided always that instead of such costs the party or parties heretofore entitled . . . to such double costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."—The plaintiffs sued the defendant under 3 & 4 Wm. 4, c. 15, s. 2, to recover penalties for infringements of their dramatic copyright in a stage play; the defendant paid into Court 8*l.*, the amount of four penalties of 40*s.* each, and the amount so paid in was taken out by the plaintiffs in satisfaction. Upon taxation of costs, a master decided that the plaintiffs had recovered less than 10*l.* in an action

PRACTICE—*continued.*

of tort within the meaning of s. 116 of the County Courts Act, 1888, and were, therefore, not entitled to any costs:—*Held*, by the Queen's Bench Division, that the plaintiffs' costs ought to be taxed: by Wills, J., on the ground that the County Courts Act, 1888, did not apply, that the costs sought to be taxed were not costs in the ordinary sense, but were part of the statutory remedy, and that the plaintiffs were entitled to a full and reasonable indemnity under 5 & 6 Vict. c. 97, s. 2; by Vaughan Williams, J., on the ground that although the costs sought to be taxed were costs in the ordinary sense, the Court ought, in the exercise of its discretion, to make an order for costs:—*Held*, by the Court of Appeal, that, assuming there was no distinction between an indemnity under 5 & 6 Vict. c. 97, s. 2, and costs in the ordinary sense, the Rules of the Supreme Court did not operate to repeal the provisions of special statutes giving special costs in particular cases, and that the plaintiffs were, therefore, entitled to have their costs taxed. REEVE *v.* GIBSON - - - - - - **C. A. 652**

22. —— *Appeal—Order whether Final or Interlocutory—Point of Law raised by Pleadings—Order dismissing Action—Order* LVIII., *r.* 3—*Order* XXV., *rr.* 2, 3.] An order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial under Order XXV., rr. 2 and 3, is not a final order within Order LVIII., r. 3. A "final order" is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. SALAMAN *v.* WARNER AND OTHERS - - **C. A. 734**

—— Justices—Jurisdiction of Court to hear appeal against Exercise of Summary Jurisdiction - - - **302**
See JUSTICES.

—— Garnishee order—Judgment debt—Action for tort to wife—Joinder of husband as co-plaintiff - - - **509**
See HUSBAND AND WIFE. 2.

—— Right of appeal to Court of Appeal—Question for opinion of High Court—Local government—Transfer of powers to county council - - - **725**
See LOCAL GOVERNMENT. 4.

—— Assignment of debt—Right of assignee to sue—Trust in respect of moneys recovered - - - - **737**
See ASSIGNMENT OF DEBT.

PRINCIPAL AND AGENT—*Fraud—Bribe paid to Agent by Third Person contracting to supply goods to Principal—Amount of Bribe added to Price of Goods—Remedies of Principal against Agent and Third Person.*] Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the

PRINCIPAL AND AGENT—*continued.*

contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first.—The plaintiffs were proprietors of gasworks, and it was the duty of their manager to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, a coal merchant, submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders, and with the view of procuring the manager's recommendation of them, the defendant corruptly agreed to pay to the manager a secret commission or bribe of 1*s.* per ton, and, in order to recoup himself for the commission so promised, he inserted in the tenders prices which were in excess by 1*s.* per ton of the prices which he would otherwise have asked. The manager, being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. The defendant delivered the coals to the plaintiffs, and was paid the prices named in the tenders. He also paid to the manager a considerable portion of the commission which he had promised. The manager received similar bribes from various other contractors, who in like manner obtained from the plaintiffs prices in excess of what they would otherwise have asked. The plaintiffs, upon discovery of the frauds, entered into an agreement with their manager that he should assist them, by giving the necessary information and evidence, to bring actions against the contractors (including the defendant) for the recovery of damages for the loss sustained by the plaintiffs in consequence of the frauds, that he should guarantee that the damages recovered in such actions should amount to a certain specified sum, that by way of security for the due performance of the guarantee he should deposit in a certain bank securities to the value of the sum guaranteed, that any sums recovered in such actions should be taken in part satisfaction of the guarantee, and that upon receipt by the plaintiffs of the full guaranteed sum they should give the manager a complete discharge. The manager duly deposited the securities in the bank. After the agreement had been entered into and the securities deposited, the plaintiffs brought an action against the defendant to recover the additional 1*s.* per ton paid to him for the coal supplied. It was contended by the defendant that the plaintiffs' cause of action was for a tort in respect of which the defendant and the manager were joint wrongdoers, and that the agreement between the plaintiffs and the manager, coupled with the deposit of the securities by the latter, amounted to a discharge of the manager by way of accord and satisfaction, and consequently operated to discharge the defendant also:—*Held*, by the Court of Appeal (affirming the judgment of the Queen's Bench Division), that the facts relied on afforded no defence to the action. THE MAYOR, &C., OF SALFORD *v.* LEVER - - - **C. A. 168**

—— Mutual Marine Insurance Association—Action against association by person not a member - - - **370**
See INSURANCE.

PRINCIPAL AND AGENT—*continued.*

—— Contract to employ for time certain—Impossibility of performance — Implied condition - - - - **544**
See CONTRACT.

PRINCIPAL AND SURETY—*Giving of Time—Covenant to pay Mortgage Debt—Covenant in Consolidated Mortgage to pay at later Date—Assignment of Benefit of Covenants in original Mortgage Deed.*] By a covenant in a mortgage deed, dated September 4, 1857, the mortgagor covenanted and the defendant covenanted as his surety for the payment of the mortgage debt of 450*l.* to the mortgagee on March 4, 1858. By a deed, dated December 15, 1884, the above-mentioned mortgage and various other mortgages, including other property, given by the mortgagor were consolidated, the plaintiff advancing the total sum of 3200*l.* for payment to the various mortgagees of the amounts of their respective debts, and taking assignments of such debts and the mortgaged properties, "with the full benefit of the covenants" contained in the respective mortgage deeds; and the mortgagor covenanted with the plaintiff for the payment of 3200*l.* on January 19, 1885. The defendant was not a party to such last-mentioned deed:—*Held*, that the covenant in that deed necessarily implied that the principal debtor could not be sued for the 450*l.* due under the covenant in the deed of 1857 before January 19, 1885, and, consequently, there had been a giving of time to the principal debtor by which the defendant as surety was discharged from liability. BOLTON *v.* BUCKENHAM - - - - **C. A. 278**

PROCESS SERVER—Solicitor—Unqualified person - - - - - **649**
See SOLICITOR.

PROOF, REJECTION OF—Bankruptcy—Annulment of adjudication - - **538**
See BANKRUPTCY. 5.

QUO WARRANTO — Vestryman — Statutory office - - - - - **57**
See METROPOLIS.

RAILWAY AND CANAL COMMISSION—*Undue Preference—Effect of Competition—"Necessity of lower charge for securing in the interests of the public the traffic in respect of which it is made"—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict.* c. 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict.* c. 25), *ss.* 7, 27.] By the Railway and Canal Traffic Act, 1888, s. 27, sub-s. 1: "Whenever it is shewn that any railway company charge one trader or class of traders or the traders in any district lower tolls rates or charges for the same or similar merchandise, or lower tolls rates or charges for the same or similar services, than they charge to other traders or classes of traders or the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the company." By sub-s. 2: "In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter or the Commissioners, as the case may be, may so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the Court or the Commissioners sanction any difference in the tolls rates or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services."—On a complaint by an association of traders in grain and flour at Liverpool against the London and North Western Railway Company for undue preference in respect of the lower rates charged by them for the carriage of these goods from Cardiff to Birmingham as compared with those charged for the carriage of them from Liverpool to Birmingham, a shorter distance, it appeared the trade of the applicants had suffered through the competition in the Birmingham market of grain and flour from the Bristol Channel and Severn ports, but that only a very small quantity was carried by the respondents from Cardiff to Birmingham. Two other railways competed with the respondents between Cardiff and Birmingham, and the lower rates complained of had been fixed with a view to competition by the respondents with the rates charged by other railways from ports in the Severn to which grain and flour were brought by sea, and which were nearer to Birmingham than Cardiff:—*Held*, that the facts shewed an undue preference by the respondents.—*Semble*, that the effect of s. 27 of the Railway and Canal Traffic Act, 1888, is not to limit the Court in dealing with questions of alleged undue preference to the consideration whether or not the lower charge is necessary in the interests of the public. THE LIVERPOOL CORN TRADE ASSOCIATION, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY [120

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—— Poor-rate—Deficiency in assessments—Liability of promoters of undertaking—Lands purchased in order to obtain withdrawal of opposition of owners to passing of special Act - - - **440**
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REFRESHER TO COUNSEL—County court—Adjournment of trial for want of time **110**
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RESTITUTION OF CONJUGAL RIGHTS—Refusal of wife to live with husband—Absence of power to deprive wife of liberty **671**
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REVENUE—*Stamp—Settlement—Contingent Reversionary Interest—Stock vested in Trustees—Power to vary Investments—Stamp Act* (33 & 34 *Vict.* c. 97), *s.* 3—*Schedule*, "*Settlement.*"] By the

REVENUE—*continued.*

Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3, and schedule, an ad valorem duty is imposed on "any instrument . . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever": —*Held* (affirming the decision of the Divisional Court), that a settlement of contingent reversionary interests in certain specified amounts of stock which were vested in trustees with power to vary the securities was liable to an ad valorem duty under the section and schedule. ONSLOW *v.* COMMISSIONERS OF INLAND REVENUE - **C. A. 239**

2. —— *Income Tax—Company residing in the United Kingdom—Trade carried on partly in the United Kingdom, partly Abroad—Profits earned Abroad not remitted to the United Kingdom—"Foreign Possessions"—5 & 6 Vict. c. 35, s. 100—16 & 17 Vict. c. 34, s. 2, Sched. D.*] The appellants were a banking company carrying on business in London, and having branches in foreign countries. They were registered under the Joint Stock Companies Acts, and had their head office and seat of direction in London. General instructions and directions for management were issued from time to time from the head office to the managers of the foreign branches. The dividends of the company were paid in London, and for the purposes of such dividends no division was made between the profits earned in London and those earned by the foreign branches. Of the profits earned by the company at the foreign branches a portion was not remitted to this country:—*Held*, that inasmuch as the business of the company was partly carried on in this country, the fact that a portion of the profits earned abroad was not remitted here did not exempt the company from liability to pay income tax on such portion. — *Colquhoun* v. *Brooks* (14 App. Cas. 493) distinguished. LONDON BANK OF MEXICO AND SOUTH AMERICA *v.* APTHORPE [383

3. —— *Income Tax—Deductions—Public Office or Employment—Money expended in Performance of Duties of Office—Husband and Wife—Joint Income—Assessment of Husband on Wife's Profits—5 & 6 Vict. c. 35, s. 45—16 & 17 Vict. c. 34, s. 2, Sched. E, s. 51.*] The respondent and his wife were master and mistress of a national school, and were paid a joint salary. The respondent was assessed to income tax, under 16 & 17 Vict. c. 34, s. 2, Sched. E, on the balance (after allowing certain deductions) of the joint income of himself and his wife. A further allowance was claimed for the wages and maintenance of a domestic servant, whose employment was necessary in order that the duties of the respondent's household might be carried on while his wife was engaged in the school:—*Held*, that the respondent held a public office or employment of profit within the meaning of Schedule E; that the deduction claimed was not for money wholly, exclusively, and necessarily expended in the performance of the duties of the respondent's office or employment within the meaning of 16 & 17 Vict. c. 34, s. 51; that by 5 & 6 Vict. c. 35, s. 45 the profits of the wife were rightly charged as the profits of the husband, and, therefore, the respondent was liable to be assessed on the joint income, and the deduction could not be allowed. BOWERS *v.* HARDING - - - - - **560**

4. —— *Income Tax—Office or Employment of Profit—Necessary Officer of Collegiate Body—Bursar of College—Income Tax Act*, 1842 (5 & 6 *Vict. c. 35), s. 146, Sched. E.*] The statutes of a college, after declaring that the college should consist of a president, fellows, and scholars, provided for the appointment by the president and fellows of a bursar, and gave them power to regulate the conditions of tenure and the powers, duties, and emoluments of the office; a further statute provided that the college seal should not be affixed to any act or document except in the presence of (among others) the bursar. The respondent was appointed bursar of the college in accordance with the provisions of the statutes at a salary which was fixed by the president and fellows and was paid to him out of the ordinary corporate revenues of the college without any deduction in respect of income tax:—*Held*, that the respondent, not being a member of the corporate body, although a necessary officer of the college, was liable to direct assessment to income tax upon the amount of his salary, as holding an office or employment of profit within the meaning of Sched. E. of the Income Tax Act, 1842. LANGSTON *v.* GLASSON - - - **567**

5. —— *Income Tax—Deductions—Money laid out or expended for Purposes of Trade—Municipal Corporation—Duty to Light Town—Power afterwards to supply Gas to Private Customers—Profits from Supply of Gas—Expenses incurred in Lighting Town—5 & 6 Vict. c. 35, s. 60, Sched. A; s. 100, Sched. D.*] By a local Act the duty was imposed upon the respondent corporation of lighting a town with gas, and the Act further provided that it should be lawful for the respondents, after lighting the town, to supply private customers with gas. The respondents, from the supply of gas to private consumers, earned profits, on which they were assessed to income tax. They claimed to deduct from these profits the expenses incurred in lighting the town, as being money wholly and exclusively laid out or expended for the purposes of a trade, within the meaning of 5 & 6 Vict. c. 35, s. 100, Sched. D, r. 1, of the rules applying to the first and second cases:—*Held*, that the lighting of the town and the supply of gas to private consumers were separate and distinct operations; that no trade was carried on until the respondents, after having lighted the town, began to supply gas to private customers, and therefore the expenses incurred in lighting the town were not money laid out or expended for the purposes of a trade, and the deduction could not be allowed. DILLON *v.* CORPORATION OF HAVERFORDWEST - - - - - **575**

6. —— *Landlord's Property Tax—Inhabited House Duty — Exemptions—"Hospital"—5 & 6 Vict. c. 35, s. 61, r. 6; 48 Geo. 3, c. 55, Sched. B, Case IV.*] An institution for the reception of insane persons was founded by charitable contributions; it was partly and substantially supported by funds derived from charitable sources, having an endowment fund, and a small portion of its income being derived from subscriptions.

REVENUE—*continued.*
It was vested in trustees and managed gratuitously by a committee. During the year previous to that for which the assessment was made the income derived from the payments made by patients and from the sale of produce on a farm belonging to the institution, without taking into account the income arising from the endowment fund and the annual subscriptions, exceeded the total expenditure:—*Held*, that the institution was not wholly self-supporting merely because the income derived from the payments of patients and the sale of produce had in a particular year exceeded the expenditure, but was a hospital maintained in part by charity, and was therefore exempt from landlord's property tax and inhabited house duty, as being a "hospital" within the meaning of 5 & 6 Vict. c. 35, s. 61, r. 6, and 48 Geo. 3, c. 55, Sched. B, Case IV.—*Needham* v. *Bowers* (21 Q. B. D. 436) distinguished. CAWSE *v.* COMMITTEE OF NOTTINGHAM LUNATIC HOSPITAL [585

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SEAMEN—Conspiracy and Protection Act, 1875—Offence against seamen by person not a seaman - - - - 771
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SEPARATE ESTATE—Husband's liability—Gift by husband to wife—Separate estate—Contract binding separate property—Death of wife—Legal personal representative - - - - 491
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SERVICE—Writ—Action against foreign firm—Service on person temporarily within jurisdiction "as partner" - - 304
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—— Leave to serve writ out of jurisdiction—Officer on board Queen's ship on high seas - - - - - 551
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SETTLEMENT—Stamp—Revenue—Contingent reversionary interest—Stock vested in trustees—Power to vary investment
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SHIP—*Bill of Lading—Charterparty—Demurrage—Fixed Number of Lay-days—Delay occasioned by Strike—Inability to perform Ship's Share of Unloading—Liability of Consignee.*] A cargo was shipped under a bill of lading incorporating a clause in the charterparty which fixed the number of lay-days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charterparty contained any exception of strikes. By the custom of the port of discharge a cargo, such as that to be unloaded was discharged by the joint act of the shipowner and the consignees. During the lay-days a strike took place, both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay-days:—*Held*, affirming the judgment of the Queen's Bench Division, that as the number of

SHIP—*continued.*

lay-days was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners, owing to the strike, to do their part in the unloading. BUDGETT & Co. *v.* BINNINGTON & Co. - - - - **C. A. 35**

2. —— *Charterparty—Advance Freight to be paid "if required"—Requirement first made after Loss of Cargo—Liability of Charterer.*] A cargo was shipped under a charterparty which contained the following clause: "One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." Shortly after the commencement of the voyage the vessel was wrecked and the cargo lost. Subsequently to the loss, and not before, the shipowner required payment of advance freight under the above clause:—*Held*, that the requirement was not too late, and that the charterer was liable to pay it. SMITH, HILL & Co. *v.* PYMAN, BELL & Co. [*See next case*] [42

3. —— *Charterparty—Advance Freight to be paid "if required"—Requirement first made after Loss of Cargo—Liability of Charterer.*] A cargo was shipped under a charterparty which contained the following clause: "One-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." Shortly after the commencement of the voyage the vessel was wrecked and the cargo lost. Subsequently to the loss, and not before, the shipowner required payment of advance freight under the above clause:—*Held*, reversing the decision of Charles, J., that the requirement by the shipowner was a condition precedent to the liability of the charterer to pay advance freight; that the requirement was made too late, and that the charterer was not liable. SMITH, HILL & Co. *v.* PYMAN, BELL & Co. [**C. A. 742**

4. —— *Bill of Lading—Incorporation of Conditions of Charterparty into Bill of Lading.*] Goods were shipped under a charterparty and bill of lading, the bill of lading providing that the goods were to be delivered at the port of discharge, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted, unto order or to assigns, they paying freight for the said goods, and all other conditions as per charter, with average accustomed." In the charterparty were the same exceptions, followed by these words: "Negligence clause, as per Baltic Bill of Lading, 1885." Amongst the perils excepted by the Baltic Bill of Lading, 1885, were "strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Owing to the negligence of the master, the ship was stranded and the goods were lost. The plaintiffs, who were indorsees of the bill of lading, but strangers to the charterparty, sued the shipowners for the loss of the goods:—*Held*, that the words, "all other conditions as per charter," did not incorporate into the bill of lading the exception of "stranding occasioned by the negligence of the master," and that the shipowners were liable to the plaintiffs. Decision of Huddleston, B. (25 Q. B. D. 501) affirmed. *Russell* v. *Niemann* (17 C. B. (N.S.) 163) is not overruled by *Gray* v. *Carr* (Law Rep. 6 Q. B. 522). SERRAINO & SONS *v.* CAMPBELL - - **C. A. 283**

SHIP—*continued.*

5. —— *Bill of Lading—Shipowner's Liability — Deviation — "Necessity."*] The "necessity" which will justify a ship in deviating from the proper course of her voyage exists where the deviation is reasonably necessary, and in considering whether it is so, danger, distance, accommodation, expense, and every other material circumstance must be taken into account; and if a competent master who is obliged to put back for repairs chooses one port in preference to a nearer one in the bonâ fide exercise of his judgment for the benefit of both the shipowner and the owner of the cargo, the Court or a jury ought not on light grounds to come to the conclusion that the deviation was unauthorized. Goods were shipped by the plaintiffs at Swansea in the defendants' vessel for delivery at New York under a bill of lading which contained the usual exception from liability for collision. The vessel after leaving Swansea encountered bad weather, was injured, and the goods damaged by water, and it became necessary to put back to a port of refuge. The master cast anchor at Queenstown and telegraphed for directions to the defendants, who were ship-builders at Bristol, but did not communicate with the plaintiffs. The defendants directed him to bring the ship back to Bristol. On her way to Bristol she was run into in the Avon by another vessel and sunk. At the trial of an action for the non-delivery of the goods on the ground that the vessel deviated from her course by proceeding to Bristol, and that the loss occurred after such deviation, it appeared that the ship was a general ship, and that there were other shippers of goods besides the plaintiffs, that although Bristol was sixty miles further than Swansea from Queenstown the vessel could have been repaired at less expense and with more despatch at the defendants' shipyards there than at Swansea, and that the defendants had other vessels into which they could have transhipped the goods. It did not however appear that Bristol was a more convenient place than Swansea for improving the condition of the damaged cargo. The judge left to the jury the question whether the master exercised the discretion of a reasonable man in the interests of the ship and cargo in going to Bristol instead of remaining at Queenstown, or going to Swansea. The jury found that there was no deviation:—*Held*, first, that there was no misdirection by the judge in not telling the jury that the plaintiffs as owners of the cargo ought to have been communicated with at Queenstown, and consulted as to what ought to be done. Secondly, that the judge was not bound to have directed the jury that upon the facts as proved there was no evidence of necessity for the ship to return to Bristol. Thirdly, that the evidence was sufficient to support the verdict on the ground that the master had acted for the best, having regard to the interests of the owners of the goods as well as of the shipowners. PHELPS, JAMES & Co. *v.* HILL - - - - - **C. A. 605**

SHIP—*continued.*

6. —— *Bill of Lading—Exception of "Pirates, Robbers, or Thieves, of whatever kind, whether on Board or not, or by Land or Sea"—Theft by Persons in Service of Ship.*] Goods were shipped on board the defendants' ship under a bill of lading containing an exception clause, by which the defendants were exempted from liability in respect of losses caused by (inter alia) "pirates, robbers, or thieves, of whatever kind, whether on board or not, or by land or sea." The goods were stolen after shipment by some or one of the stevedore's men employed in the service of the ship:—*Held*, that the exception clause did not apply to thefts committed by persons in the service of the ship, and that the defendants were consequently responsible for non-delivery of the goods. Steinman & Co. *v.* Angier Line - - - C. A. 619

7. —— *Charterparty—Cesser Clause—Charterer's Liability to cease on Cargo being loaded—Lien for Demurrage—Damages for Detention at Port of Loading.*] By a charterparty the ship was to load a cargo in the usual and customary manner and proceed to the port of discharge, and there deliver the same "to be unloaded at the average rate of not less than 100 tons per working day . . . or charterers to pay demurrage at the rate of 4*d.* per ton register per diem . . . the charterers' liability under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage." In an action by the shipowner against the charterers to recover damages for detention at the port of loading:—*Held*, that the word "demurrage" in the lien clause did not cover damages for undue detention at the port of loading, and that therefore the cesser clause did not exempt the charterers from liability for the delay—*Bannister* v. *Breslauer* (Law Rep. 2 C. P. 497) discussed. Clink *v.* Radford & Co. [C. A. 625

SLANDER—Privileged occasion—Meeting of poor law guardians—Presence of reporters at meeting - - - - 474
See Defamation. 2.

SOLICITOR—*Unqualified Person—Process-server employed by Solicitor—Settlement of Affidavit—6 & 7 Vict. c. 73, s. 2—23 & 24 Vict. c. 127, s. 26.*] A person employed by a solicitor as a process-server, who settles the affidavits of persons in his employment relating to service of process, does not by so doing act as a solicitor within the meaning of 6 & 7 Vict. c. 73, s. 2, so as to be liable to attachment for contempt of Court under 23 & 24 Vict. c. 127, s. 26. In re Louis. Ex parte The Incorporated Law Society - 649

2. —— *Lien—Charging Order—Money paid into Court—Claim and Counterclaim—Property "recovered or preserved"—23 & 24 Vict. c. 127, s. 28.*] The plaintiff claimed 742*l.* for work done under a contract to repair the defendants' ship. The defendants paid 500*l.* into court, with a denial of liability, and counter-claimed damages for the plaintiff's delay in completing the work according to the contract. The plaintiff proceeded with the action, and in the result 465*l.* was found to be due to him on his claim, and 210*l.* to the defendants on their counter-claim:—*Held*, that the sum paid into court was not property "recovered or preserved" by the exertions of the plaintiff's solicitor within the meaning of 23 & 24 Vict. c. 127, s. 28, so as to entitle him to charge the whole sum with payment of his costs.—*Held*, also, that the claim and counter-claim must be treated as one action for the purpose of determining the solicitor's right to a charging order for his costs; that the sum recovered in the action was the balance remaining in favour of the plaintiffs after deducting from the amount found to be due on his claim the amount found to be due to the defendants on their counter-claim, and therefore that the plaintiff's solicitor was only entitled to a charging order in respect of that balance. Westacott *v.* Bevan - - - - - - 774

STAMP — Settlement — Contingent reversionary interest — Stock vested in trustees — Power to vary investments - 239
See Revenue.

STATUTE—*Construction—Act not to apply to Seamen—Offence against Seamen by Person not a Seaman—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 16.] Section 16 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), which enacts that the Act shall not apply to seamen, means only that the punishments prescribed by the Act are not to fall on seamen. The case of an offence against a seaman by a person who is not a seaman is therefore not excluded from the Act by this section. Kennedy *v.* Cowie - - 771

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21 Jac. 1, c. 16 - - - - 468
See Limitations, Statute of.

35 Geo. 3, c. 101, s. 2 - - - 722
See Poor Law.

48 Geo. 3, c. 55, Sched. B, Case IV. - 585
See Revenue. 6.

9 Geo. 4, c. 61, s. 14 - - - 718
See Licensing Acts.

3 & 4 Wm. 4, c. 15, s. 2 - - - 652
See Practice. 21.

4 & 5 Wm. 4, c. 76, s. 84 - - - 722
See Poor Law.

1 & 2 Vict. c. 74 - - - - 730
See Landlord and Tenant. 3.

1 & 2 Vict. c. 110, ss. 14, 15 - - 450
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3 & 4 Vict. c. 88, ss. 3, 27, 28 - - 53
See Local Government. 2.

4 & 5 Vict. c. 39, s. 25 - - - 267
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5 & 6 Vict. c. 35, s. 45 - - - 560
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—— —— s. 60, Sched. A, s. 100, Sched. D
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—— —— s. 61, r. 6 - - - 535
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—— —— s. 100 - - - - 383
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—— —— s. 146, Sched. E - - 567
See Revenue. 4.

STATUTES—*continued.*

5 & 6 Vict. c. 97, s. 2 - - - 652
See PRACTICE. 21.

6 & 7 Vict. c. 18, s. 38 - - - 253
See PARLIAMENT. 2.

6 & 7 Vict. c. 18, s. 51 - - - 747
See CRIMINAL LAW. 4.

—— —— s. 74 - - - - 267
See PARLIAMENT. 4.

6 & 7 Vict. c. 73, s. 2 - - - 649
See SOLICITOR.

8 & 9 Vict. c. 18, ss. 2, 133 - - 182
See POOR-RATE.

—— —— s. 133 - - - - 440
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16 & 17 Vict. c. 34, s. 2, Sched. D - 383
See REVENUE. 2.

—— —— —— Sched. E, s. 51 - - 560
See REVENUE. 3.

17 & 18 Vict. c. 31, s. 2 - - - 120
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18 & 19 Vict. c. 120, s. 6 - - - 57
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See METROPOLIS. 2.

20 & 21 Vict. c. 43, s. 2 - - - 302
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21 & 22 Vict. c. xii - - - 186
See POOR-RATE. 2.

23 & 24 Vict. c. 127, s. 26 - - 649
See SOLICITOR.

—— —— s. 28 - - - - 774
See SOLICITOR. 2.

24 & 25 Vict. c. 96, s. 75 - - 112
See CRIMINAL LAW.

25 & 26 Vict. c. 103, ss. 18, 19 - - 378
See POOR-RATE. 5.

29 & 30 Vict. c. 118 - - - 330
See POOR-RATE. 3.

30 & 31 Vict. c. 102, s. 3 - - - 250
See PARLIAMENT.

30 & 31 Vict. c. 134, s. 15 - - - 790
See METROPOLIS. 3.

32 & 33 Vict. c. 67, ss. 1, 11, 19 - - 378
See POOR-RATE. 5.

32 & 33 Vict. c. 71, s. 81 - - - 538
See BANKRUPTCY. 5.

33 & 34 Vict. c. 52, s. 3 (1) - - 149
See CRIMINAL LAW. 2.

33 & 34 Vict. c. 71, s. 52 - - - 785
See BANK OF ENGLAND.

33 & 34 Vict. c. 75, Sched. II., Part I., r. 14
See EDUCATION. [118

33 & 34 Vict. c. 97, s. 3 - - - 239
See REVENUE.

35 & 36 Vict. c. 21 - - - - 330
See POOR-RATE. 3.

35 & 36 Vict. c. 60, s. 15, sub-s. 6 - 694
See MUNICIPAL CORPORATION.

35 & 36 Vict. c. 76, s. 17 - - - 496
See MINE.

35 & 36 Vict. c. 77, s. 23, sub-s. 10 - 71
See MINE.

STATUTES—*continued.*

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TRADE-MARK—*continued.*
at the same time left at the appellant's house an invoice in which the casks were described as "barrels." The term "barrel" in the beer trade means a cask containing thirty-six gallons. The invoice was not physically attached to any of the casks. Of the casks so delivered, one was of a considerably less capacity than thirty-six gallons. The appellant summoned the respondent under s. 2, sub-s. 1 (*d*), of the Merchandise Marks Act, 1887, for having applied a false trade description, namely, barrel, to a cask of beer false as to the measure and gauge thereof:—*Held*, that the description of the cask in the invoice was not the less applied to the cask within the meaning of the Act because the invoice was not physically attached to the cask. BUDD *v.* LUCAS - 408

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